DOCKET

No. 08-322
Title: Northwest Austin Municipal Utility District Number One, Appellant
v.
Eric H. Holder, Jr., Attorney General, et al.
Docketed: September 10, 2008
Lower Ct: United States District Court for the District of Columbia
Case Nos.: (06-1384)
Decision Date: May 30, 2008
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 8 2008	Statement as to jurisdiction filed. (Response due October 10, 2008)
Sep 30 2008	Order extending time to file response to jurisdictional statement to and including November 10, 2008, for all appellees.
Oct 10 2008	Brief amicus curiae of Mountain States Legal Foundation filed.
Nov 4 2008	Order further extending time to file response to the jurisdictional statement to and including November 24, 2008, for all appellees.
Nov 18 2008	Order further extending time to file response to petition to and including November 26, 2008, for all appellees.
Nov 26 2008	Motion to affirm filed by appellee Michael B. Mukasey, Attorney General.
Nov 26 2008	Motion to affirm filed by appellees Intervenor-Appellees Texas State Conference of NAACP, et al.
Dec 9 2008	Reply of appellant Northwest Austin Municipal Utility District Number One filed. (Distributed) TBP
Dec 10 2008	DISTRIBUTED for Conference of January 9, 2009.
Jan 9 2009	PROBABLE JURISDICTION NOTED The brief of appellant is to be filed on or before Thursday, February 19, 2009. The brief of appellees is to be filed on or before Wednesday, March 18, 2009. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Jan 21 2009	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for all intervenor-appellees (other than the Attorney General of the United States).
Jan 23 2009	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the appellant.
Jan 29 2009	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the Diaz Intervenor-Appellees.
Feb 19 2009	Joint appendix filed. (Statement of costs filed)
Feb 19 2009	Brief of appellant Northwest Austin Municipal Utility District Number One filed.
Feb 23 2009	SET FOR ARGUMENT ON Wednesday, April 29, 2009.
Feb 25 2009	Brief amicus curiae of Scharf-Norton Center for Constitutional Litigation Goldwater Institute filed.
Feb 26 2009	Brief amici curiae of Dr. Abigail Thernstrom and Former Justice Department Officials filed.
Feb 26 2009	Brief amicus curiae of Honorable Bob Riley, Governor of Alabama in support of neither party filed.

Feb 26 2009 Brief amici curiae of Nathaniel Persily, Stephen Ansolabehere, and Charles Stewart III in support of neither party filed.

Feb 26 2009 Brief amicus curiae of Georgia Governor Sonny Perdue filed.

Feb 26 2009 Brief amici curiae of Pacific Legal Foundation, et al. filed.

Feb 26 2009 Brief amicus curiae of Mountain States Legal Foundation filed.

Feb 26 2009 Brief amicus curiae of the Southeastern Legal Foundation filed.

Mar 9 2009 Record from the U.S.D.C. for the District of Columbia is electronically filed.

Mar 13 2009 DISTRIBUTED.

Mar 18 2009 Brief of appellee Eric H. Holder, Jr., Attorney General filed. (Distributed)

Mar 18 2009 Brief of appellees Intervenors-Appellees Rodney and Nicole Louis, et al. filed. (Distributed)

Mar 18 2009 Brief of appellees Intervenor-Appellees Texas State Conference of NAACP, et al. filed. (Distributed)

Mar 18 2009 Brief of appellee Travis County filed. (Distributed)

Mar 19 2009 Letter from counsel for Intervenors-Appellees Rodney and Nicole Louis, et al. proposing to lodge copies of letters issued by the U.S. Department of Justice.

Mar 25 2009 Brief amicus curiae of Civil Rights Clinic at Howard University School of Law filed. (Distributed)

Mar 25 2009 Brief amicus curiae of Constitutional Accountability Center filed. (Distributed)

Mar 25 2009 Brief amici curiae of Members of the Texas House of Representatives filed. (Distributed).

Mar 25 2009 Brief amicus curiae of Brennan Center for Justice at NYU School of Law filed. (Distributed)

Mar 25 2009 Brief amicus curiae of American Bar Association filed. (Distributed)

Mar 25 2009 Motion for divided argument filed by appellees Eric H. Holder, Jr., Attorney General.

Mar 25 2009 Brief amici curiae of Leadership Conference on Civil Rights, et al. filed. (Distributed)

Mar 25 2009 Brief amici curiae of Alaska Native Voters and Tribes filed. (Distributed)

Mar 25 2009 Brief amici curiae of Former Republican Officeholders filed. (Distributed)

Mar 25 2009 Brief amici curiae of North Carolina, et al. filed. (Distributed)

Mar 25 2009 Brief amici curiae of Asian American Justice Center, et al. filed. (Distributed)

Mar 25 2009 Brief amici curiae of Navajo Nation, et al. filed. (Distributed)

Mar 25 2009 Brief amici curiae of Jurisdictions That Have Bailed Out Under the Voting Rights Act filed. (Distributed)

Mar 25 2009 Brief amici curiae of Julius Chambers, et al. filed. (Distributed)

Mar 25 2009 Brief amici curiae of Asian American Legal Defense and Education Fund, et al. filed.

Mar 25 2009 Brief amici curiae of Reps. John Conyers, Jr., et al. filed. (Distributed)

Mar 25 2009 Brief amici curiae of Nicholas deB. Katzenbach, et al. filed. (Distributed)

Mar 25 2009 Brief amicus curiae of Honorable Congressman John Lewis filed.

Mar 25 2009 Brief amici curiae of Barbara Lee, Member of Congress, et al filed. (Distributed)

Mar 30 2009 Application (08A855) for leave to file appellant's reply brief on the merits in excess of the word limitation, submitted to The Chief Justice.

Apr 1 2009 Application (08A855) denied by The Chief Justice.

Apr 3 2009 Motion for divided argument filed by respondent GRANTED.

Apr 15 2009 Reply of appellant Northwest Austin Municipal Utility District Number One filed.

(Distributed)

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JURISDICTIONAL STATEMENT

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(1)

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No. 08-322 SEP 8 - 2008

OFFICE OF THE CLERK

In The

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

-v.-

MICHAEL B. MUKASEY, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether §4(a) of the Voting Rights Act, which permits "political subdivisions" of a State covered by §5's requirement that certain jurisdictions preclear changes affecting voting with the federal government to bail out of §5 coverage if they can establish a ten-year history of compliance with the VRA, must be available to any political subunit of a covered State when the Court's precedent requires "political subdivision" to be given its ordinary meaning throughout most of the VRA and no statutory text abrogates that interpretation with respect to §4(a).

2. Whether, under the Court's consistent jurisprudence requiring that remedial legislation be congruent and proportional to substantive constitutional guarantees, the 2006 enactment of the §5 preclearance requirement can be applied as a valid exercise of Congress's remedial powers under the Reconstruction Amendments when that enactment was founded on a congressional record demonstrating no evidence of a persisting pattern of attempts to evade court enforcement of voting-rights guarantees in jurisdictions covered only on the basis of data 35 or more years old, or even when considered under a purportedly less stringent rational-basis standard.

PARTIES TO THE PROCEEDING

Northwest Austin Municipal Utility District No. 1 is the only appellant. The appellees are Michael B. Mukasey in his official capacity as Attorney General of the United States and these additional appellees that intervened as defendants below: the Austin Branch of the NAACP; Jovita Casares; David, Gabriel, and Lisa Diaz; Angie Garcia; Winthrop and Yvonne Graham; Nathaniel Lesane; Nicole and Rodney Louis; People for the American Way; Jamal, Marisa, and Wendy Richardson; the Texas State Conference of NAACP Branches; Travis County, Texas; and Ofelia Zapata.

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No. _____

In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

-v.-

MICHAEL B. MUKASEY, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court's opinion, reported at 557 F.Supp.2d 9, is reprinted at App.1-183.[1]

[1] Citations to the Appendix are in the form App.___. Citations to pleadings below are in the form Dkt. No. ___. Citations to exhibits to appellant's summary judgment motion below are in the form SJEx.___ at ___:___.

JURISDICTION

The district court had jurisdiction under 42 U.S.C. §§1973*b* and 1973*l* and issued its judgment on May 30, 2008, and notice of appeal was timely filed. This Court has jurisdiction under 42 U.S.C. §1973*b*(a)(5) and 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 1 and 5 of the Fourteenth Amendment; the Fifteenth Amendment; Section 4 of the Voting Rights Act, 42 U.S.C. §1973*b*; and Section 5 of the Voting Rights Act, 42 U.S.C. §1973*c*, are reprinted in the Appendix.

STATEMENT

This appeal puts before the Court the most federally invasive law in existence, a provision recently reimposed on certain parts of the country premised only on an unjustified presumption that those state and local governments are systematically incapable of fulfilling their constitutional and statutory obligation to respect the voting rights of all. And, in reimposing that invasive federal preemptive oversight on local voting changes, Congress used a formula first instituted in 1965 and that has not been updated since 1975. In other words, Congress reenacted an unparalleled federal veto over law- and policymaking by certain States and localities without any meaningful evaluation of whether the

circumstances originally used to justify the law continue to exist and without any reconsideration of the geographic areas of the country in which it might constitutionally be reimposed. The three-judge district court has failed to hold Congress to any meaningful constitutional standard and, further, has erroneously interpreted the bailout provision, the only statutory escape from preclearance, so narrowly as to essentially write it out of existence for countless jurisdictions with demonstrably clean records of protecting voting rights.

This case concerns the constitutionality of §5 of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §2, 120 Stat. 577, and the application of §4(a) of that act, which is intended to provide relief from §5's strictures for qualifying jurisdictions. Section 5 requires certain States and localities to "preclear" any change affecting voting, however minute, with the federal government, usually through the Executive, before it goes into effect. Section 4(a), at least in theory, provides covered jurisdictions demonstrating a ten-year history of compliance with statutory and constitutional mandates the opportunity to "bail out" from §5 coverage.

The Court and commentators have long recognized §5 as a uniquely intrusive "inversion of the normal federal-state relationship." Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 216 (2007). Congress first enacted

judgment that failure to renew the Act's temporary provisions would undermine significant gains in minority participation, properly extended section 5 in "a valid exercise of its authority under the Fourteenth and Fifteenth Amendments." Def.'s Mem. at 9. The intervenors likewise contend that "[s]ection 5 is valid enforcement legislation under the Fourteenth and Fifteenth Amendments and is consistent with principles of federalism." Reply Mem. in Supp. of Def.-Intervenors' Mots. for Summ. J. at 8.

Before addressing the District's constitutional claim, we must determine whether its challenge is facial, as applied, or both. In its original complaint, the District argued that section 5 should "be struck down as unconstitutional, either on its face, or as applied." Compl. ¶ 23 In its amended complaint, however, the District reframed its case exclusively as an "as applied" challenge, leaving the parties and this court puzzled about the District's intentions. Am. Compl. ¶ 23. Nowhere has the District explained – not in its amended complaint, not in its briefs, and not at oral argument – the nature of its as-applied challenge or how that claim differs from the facial challenge pleaded in its original complaint. In any event, as the Attorney General and intervenors point out, the nature of the District's challenge, however labeled, is facial. Like the plaintiffs in *Katzenbach* and *City of Rome,* the District alleges that section 5 exceeds Congress's enumerated powers. Although the District uses the as-applied label in its amended

complaint, the arguments offered in its briefs – which focus almost exclusively on the legislative record and the statutory design – indicate that it still regards its challenge as facial. Accordingly, we shall treat the District's challenge as facial. *See infra* Parts IV and V. Out of an abundance of caution, however, we shall also consider the two arguments the District makes that could be construed as reflecting an as-applied challenge. *See infra* Part VI.

In order to resolve the District's facial challenge to section 5, we must first determine the appropriate standard of review. In two lines of cases, the Supreme Court has articulated two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments. One line, relied on by the District, begins with *City of Boerne v. Flores,* 521 U.S. 507, in which the Court established a congruence and proportionality test for certain legislation enacted pursuant to section 5 of the Fourteenth Amendment. According to the District, in extending section 5 of the Act, Congress failed to clear the "high evidentiary hurdle" of showing that "a 1965 remedy was congruent and proportional to the facts on the ground in 2006." Pl.'s Mem. at 43. Disagreeing, the Attorney General, supported by the Diaz intervenors, argues that given Congress's amply supported findings that section 5 "has been effective at preventing and remedying some voting discrimination" and that "covered jurisdictions continue to discriminate in voting against minority citizens," the provision "remains a congruent and proportional means of enforcing the

Constitution's prohibition on race and national origin discrimination in voting." Def.'s Mem. at 8-9; *see also* Mem. in Supp. of Mot. for Summ. J. of Def.-Intervenors Lisa Diaz et al. at 8-10 ("Diaz Mem."). Although NAACP intervenors agree with the Attorney General that Congress has satisfied the congruence and proportionality standard, they also invoke an earlier and less demanding test, namely the one articulated in *South Carolina v. Katzenbach,* 383 U.S. 301. Mem. of P. & A. in Supp. of Mot. for Summ. J. of Def.-Intervenors Texas NAACP et al. at 27, 29 ("NAACP Mem."). There, the Supreme Court held that when acting pursuant to Section 2 of the Fifteenth Amendment, "Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach,* 383 U.S. at 324 (emphasis added). Applying that standard, the Court sustained the constitutionality of the Voting Rights Act both as originally enacted, *id.* at 337, and as extended in 1975 under both the Fourteenth and Fifteenth Amendments, *City of Rome,* 446 U.S. at 183. According to NAACP intervenors, an "unbroken line of authority refutes any possible contention" that the holdings in *Katzenbach* and *City of Rome* have "lost their force . . . because *Boerne* requires a different analysis." NAACP Mem. at 35. Further developing this theory, the Brennan Center for Justice argues that "while the Supreme Court has found some statutes were not an appropriate means of enforcing the *Fourteenth Amendment,* the Court has been far more deferential when Congress's *Fifteenth Amendment* powers are at stake." Mem. of Law of the Brennan Center for

Justice at NYU School of Law, Amicus Curiae, in Supp. of Def.'s and Def.-Intervenors' Mot. for Summ. J. at 2.

In the following pages we summarize these two lines of cases in some detail: the *Katzenbach* rationality standard in Part IIIA and the more rigorous *City of Boerne* test in Part IIIB. Informed by this review, we conclude in Part IIIC that notwithstanding the *City of Boerne* cases, *Katzenbach's* rationality standard remains fully applicable to constitutional challenges to legislation aimed at preventing racial discrimination in voting.

A.

In *South Carolina v. Katzenbach,* the Supreme Court began by explaining the Fifteenth Amendment's impact on the relationship between Congress and the states: by adding section 2's enforcement clause, "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. . . . Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *Katzenbach,* 383 U.S. at 326. As framed by the Court, the "basic question" was whether Congress had "exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States." *Id.* at 324. To answer this question, the Court employed the test set forth in *McCulloch v. Maryland* for statutes enacted pursuant

to the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 326 (quoting *McCulloch v. Maryland,* 17 U.S. 316, 421 (1819)). Put simply, "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 324.

Applying this deferential standard, the Court declared the Act a "legitimate response" to "nearly a century of systematic resistance to the Fifteenth Amendment." *Id.* at 328. Emphasizing the "great care" with which Congress examined racial discrimination in voting, the Court explained that two points "emerge[d] vividly from the voluminous legislative history":

> First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

Id. at 308-09. Restricting section 5 and the other temporary provisions to certain states was "permissible,"

the Court concluded, because having compiled "reliable evidence of actual voting discrimination" in covered jurisdictions, Congress had only to show that its coverage formula was "relevant to the problem." *Id.* at 329-30. The Court found the formula "rational in both practice and theory." *Id.* at 330. The Court also concluded that section 5 preclearance represented a "permissibly decisive" response to the risk that covered jurisdictions "might try" to devise new voting rules to evade the Act's remedies, as certain states had previously done "in the face of adverse court decrees." *Id.* at 335. "Exceptional conditions," the Court declared, "can justify legislative measures not otherwise appropriate." *Id.* at 334.

Just three months later, in *Katzenbach v. Morgan,* 384 U.S. 641 (1966), the Court extended *Katzenbach's* rationality test to provisions of the Voting Rights Act passed pursuant to section 5 of the Fourteenth Amendment. Like section 2 of the Fifteenth Amendment, section 5 of the Fourteenth Amendment gives Congress "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. At issue in *Morgan* was section 4(e), which provides (in effect) that no person who successfully completes sixth grade in an accredited Spanish-language school in Puerto Rico "shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret . . . English." 42 U.S.C. § 1973b(e). New York voters challenged section 4(e), arguing that it exceeded Congress's Fourteenth Amendment authority. Holding

that *McCulloch's* rationality standard provides "the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment," *Morgan,* 384 U.S. at 651 (quoting U.S. CONST. amend. XIV, § 5), the Court concluded that Congress had reasonably determined that section 4(e) would promote the nondiscriminatory provision of public services by enhancing the Puerto Rican community's "political power," *id.* at 652-53. The Court also found that Congress could reasonably have enacted section 4(e) to eliminate "an invidious discrimination in establishing voter qualifications." *Id.* at 653-54.

In subsequent years, the Supreme Court repeatedly applied the rationality standard in cases challenging the constitutionality of Voting Rights Act reauthorizations. For example, as part of the 1970 reauthorization, Congress renewed section 4(a)'s ban on literacy tests and extended it to the entire nation. 1970 Amendments § 201, 84 Stat. at 315 (codified as amended at 42 U.S.C. § 1973aa). In *Oregon v. Mitchell,* 400 U.S. 112 (1970), the Court, though splintering on other issues, applied *Katzenbach* and *Morgan* and unanimously sustained the nationwide ban. *Id.* at 118 (opinion of Black, J.) (announcing judgment of the Court); *id.* at 217 (opinion of Harlan, J.) ("[T]he choice which Congress made was within the range of the reasonable."); *id.* at 231 (opinion of Brennan, J.) ("[C]ongressional power to enact the challenged Amendments is found in the enforcement clauses of the Fourteenth and Fifteenth Amendments, and . . . we may easily perceive a rational

basis for the congressional judgments underlying each of them."). Eight justices believed the Fifteenth Amendment gave Congress ample authority to extend the ban; one believed the Fourteenth Amendment did so. *See City of Rome,* 446 U.S. at 176-77 & n.13 (discussing *Mitchell*). None required Congress to make a terribly strong evidentiary showing. Indeed, Justice Harlan wrote that "[d]espite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious." *Mitchell,* 400 U.S. at 216 (opinion of Harlan, J.). In another case involving the 1970 Amendments, *Georgia v. United States,* 411 U.S. 526 (1973), Georgia challenged the constitutionality of section 5's extension, but the Court summarily rejected the claim, reiterating that "for the reasons stated at length in [*Katzenbach*] . . . the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment." *Id.* at 535.

In 1975, this time acting pursuant to both the Fourteenth and Fifteenth Amendments, Congress again extended section 5, adding provisions to protect the voting rights of language minorities – defined as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 1975 Amendments § 207, 89 Stat. at 402 (codified at 42 U.S.C. § 1973*l*(c)(3)); *see also* 28 C.F.R. § 55.1 (adopting same definition); *supra* pp. 7-8. Challenging the

constitutionality of the 1975 extension and foreshadowing the issue we face here, Rome, Georgia, argued that section 5's preclearance provisions "had outlived their usefulness" and no longer represented appropriate enforcement legislation. *City of Rome*, 446 U.S. at 180. Rejecting this argument, the Supreme Court reaffirmed *Katzenbach's* holding that Congress's authority under section 2 of the Fifteenth Amendment is "no less broad than its authority under the Necessary and Proper Clause." *Id.* at 175. According to the Court, then, the question before it was whether "Congress could rationally have concluded" that extending section 5 was necessary. *Id.* at 177.

Applying this permissive standard, the Court reviewed three types of evidence compiled by Congress: (1) racial disparities in registration and turnout rates; (2) the number of black elected officials; and (3) the number and types of voting changes submitted for preclearance, along with the number and nature of objections interposed by the Attorney General. *Id.* at 180-81. The Court found that Congress had given "careful consideration" to this evidence – which showed that progress since 1965, "though 'undeniable,' had been 'modest and spotty'" – and "decline[d] this invitation to overrule Congress' judgment that the 1975 extension was warranted." *Id.* (quoting H.R. REP. NO. 94-196, at 7-11 (1975); S. REP. NO. 94-295, at 11-19 (1975)). As the Court explained, Congress thought reauthorization "necessary to preserve the 'limited and fragile' achievements of the Act" and to "counter the perpetuation of 95 years

of pervasive voting discrimination." *Id.* at 182 (quoting H.R. REP. NO. 94-196, at 10-11 (1975)). According to the Court, this "considered determination" was "both unsurprising and unassailable," making section 5's extension "plainly a constitutional method of enforcing the Fifteenth Amendment." *Id.*

The final case in this series, *Lopez v. Monterey County,* 525 U.S. 266, came just nine years ago. There, the Court held that Monterey County, a separately designated political subdivision in California, had to preclear voting changes required by state law "notwithstanding the fact that the State is not itself a covered jurisdiction." *Id.* at 282. Citing both *Katzenbach* and *City of Rome,* the Court observed that it had "specifically upheld the constitutionality of § 5 of the Act against a challenge that this provision usurps powers reserved to the States." *Id.* at 283. Even the dissent recognized that both *Katzenbach* and *City of Rome* had "compared Congress' Fifteenth Amendment enforcement power to its broad authority under the Necessary and Proper Clause." *Id.* at 294 (Thomas, J., dissenting). Critically, neither the majority nor the dissent questioned that standard even though *Lopez* came two years after *City of Boerne,* the case that announced the congruence and proportionality test, to which we now turn.

B.

The Fourteenth Amendment cases upon which the District relies begin with *City of Boerne,* which

involved a constitutional challenge to the Religious Freedom Restoration Act (RFRA). *City of Boerne,* 521 U.S. at 515-16. Purporting to enforce the Constitution's free exercise guarantee, Congress relied on section 5 of the Fourteenth Amendment to apply RFRA to the states. Though acknowledging that section 5 represents a broad grant of legislative power to remedy and deter constitutional violations, even if the prohibited conduct itself is constitutional or the prohibition intrudes on state sovereignty, the Court stressed that this power is "'not unlimited.'" *Id.* at 518 (quoting *Mitchell,* 400 U.S. at 128 (opinion of Black, J.)). In particular, the Court held that Congress's remedial power authorizes it neither to "decree the substance of the Fourteenth Amendment's restrictions" nor to "make a substantive change in the governing law." *Id.* at 519. While observing that Congress deserves "wide latitude" in drawing the line between remedial and substantive legislation, the Court demanded "a *congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520 (emphasis added).

The Court held that RFRA failed this test for several reasons. To begin with, the legislative history documented not a single state law involving deliberate religious persecution in the previous forty years; the congressional hearings instead focused on laws imposing incidental burdens on the free exercise of religion. *Id.* at 530. The Court contrasted this record, which "lack[ed] examples of modern instances of

generally applicable laws passed because of religious bigotry," with the "record which confronted Congress and the Judiciary in the voting rights cases." *Id.* Moreover, RFRA's "[s]weeping coverage" and lack of either a termination date or termination mechanism led the Court to view it as far "out of proportion to a supposed remedial or preventive object." *Id.* at 532. Finally, by imposing litigation burdens and regulatory constraints on states, RFRA exacted "substantial costs" that "far exceed[ed] any pattern or practice of unconstitutional conduct." *Id.* at 534. For all of these reasons, the Court held that Congress had exceeded its Fourteenth Amendment authority by applying RFRA to the states. In doing so – and central to the issue before us – the Court contrasted RFRA with section 5 of the Voting Rights Act, observing that the latter included an expiration date, affected a discrete class of state laws, applied only to regions where discrimination was severe, and allowed covered jurisdictions to bail out. *Id.* at 532-33.

In a series of later cases, the Court refined *City of Boerne's* congruence and proportionality test, holding that those parts of three statutes abrogating state sovereign immunity exceeded Congress's Fourteenth Amendment authority. In each case the Court left intact statutory provisions, enacted pursuant to the Commerce Clause, that regulated private conduct. In the first case, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,* 527 U.S. 627 (1998), the Court invalidated provisions of the Patent and Plant Variety Protection Remedy Clarification Act

that made states liable in federal courts for patent infringement. *Id.* at 647. In *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000), the Court struck down provisions of the Age Discrimination in Employment Act that authorized suits for money damages against state employers. *Id.* at 91. And in *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001), the Court invalidated provisions of Title I of the Americans with Disabilities Act (ADA) that subjected state employers to money damages for violating the Act. *Id.* at 374. As in *City of Boerne,* the Court contrasted the thin legislative records of unconstitutional state action in *Florida Prepaid* and *Garrett* with the "undisputed record of racial discrimination confronting Congress in the voting rights cases." *Fla. Prepaid,* 527 U.S. at 640; *see also Garrett,* 531 U.S. at 373 ("In t[he Voting Rights] Act, Congress documented a marked pattern of unconstitutional action by the States."). Also, as in *City of Boerne,* the Court contrasted the broad accommodation duty at issue in *Garrett* with the Voting Rights Act's "detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified." *Garrett,* 531 U.S. at 373.

Following these cases, two statutes abrogating state sovereign immunity pursuant to the Fourteenth Amendment survived constitutional challenges under the *City of Boerne* test. In *Nevada Department of*

Human Resources v. Hibbs, 538 U.S. 721 (2003), the Court rejected a challenge to Family and Medical Leave Act (FMLA) provisions allowing recovery of money damages from states. *Id.* at 740. One year later, in *Tennessee v. Lane,* 541 U.S. 509 (2004), the Court rejected a constitutional challenge to ADA Title II, which generally prohibits states from excluding disabled individuals from public services, programs, and entities, including state courthouses – the focus of plaintiffs' claims. *Id.* at 533-34. In *Hibbs* the Court emphasized that as with the Voting Rights Act, Congress enacted the FMLA only after being "confronted [with] a 'difficult and intractable proble[m]' where previous legislative attempts had failed." *Hibbs,* 538 U.S. at 737 (citations omitted) (second alteration in original); *see also Lane,* 541 U.S. at 531 ("[Congress] faced . . . considerable evidence of the shortcomings of previous legislative responses."). Distinguishing *Garrett* and *Kimel,* the Court explained in both *Hibbs* and *Lane* that Congress sought to enforce a right or to protect a class that receives heightened judicial scrutiny: suspect gender classifications (the FMLA) and the fundamental right of access to courts (ADA Title II). *Hibbs,* 538 U.S. at 735; *Lane,* 541 U.S. 529. By contrast, as the Court had previously observed, disparate state treatment on the basis of age (*Kimel*) and disability (*Garrett*) receive only rational basis review. *Kimel,* 528 U.S. at 83; *Garrett,* 531 U.S. at 366-68.

Taken together, these four cases – *Kimel, Garrett, Hibbs*, and *Lane* – add a preliminary but critical step

To the extent the district court relied on the statute's actual text, it misread that text to reach a result contradicting Congress's intention of expanding bailout. Until 1982, §4(a) limited bailout eligibility to covered states and separately covered subdivisions. The district court correctly noted that in 1982, Congress expanded eligibility to include "any political subdivision of [a covered] State . . . , though [the coverage] determinations were not made with respect to such subdivision as a separate unit." App.24. Despite the fact that §14(c)(2) is mentioned nowhere in §4(a), the district court concluded that because Congress did not "stop at the comma" but went on to add the phrase "though [the coverage] determinations were not made with respect to such subdivision as a separate unit," Congress meant for the term "political subdivision" to acquire the definition articulated in §14(c)(2). App.24-25.

The district court's interpretation is incorrect because the language following the comma is clarifying rather than limiting. Section 4(a) had previously tied separate coverage to bailout eligibility; so the added language was necessary to clarify that subdivisions within a covered state now had the same right as the separately-covered subdivisions to bail out. The added language simply did not expand the reach of §14(c)(2)—the only possible source of a constricted definition of "political subdivision" that would exclude political subunits like the district. Yet the added language is not mere

"surplusage," App.25, because it serves the vital purpose of clarification. Had Congress wished to limit §4(a) to those subdivisions defined by §14(c)(2), Congress could have easily rewritten the statute to that effect. Because Congress did not, Congress's express statutory intent was only to extricate the concept of separate coverage from the requirements for bailout eligibility, not to abrogate the Court's cabining of §14(c)(2)'s definition of "political subdivision." Because the 2006 and 1982 enactments intended to expand access to bailout, the statute cannot be interpreted so as to make bailout an unworkable and rarely used process.

B. The District Court's Interpretation of §4(a) Cannot Stand Alongside Its Further Conclusion That §5 Is a Constitutional Exercise of Congress's Remedial Power.

"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," it is the Court's duty "to adopt the latter." *United States ex rel. Attorney Gen.* v. *Del. & Hudson Co.*, 213 U.S. 366, 408 (1909). Rather than adopting a "reasonable construction"—indeed, the only construction that can be squared with the text, judicial precedent, and congressional purpose—that might "save [the] statute from unconstitutionality," *Hooper* v. *California*, 155 U.S. 648, 657 (1895), the district court adopted an

interpretation fraught with constitutional concerns. Simply put, the district court's interpretation makes bailout legally and practically unachievable for the vast majority of covered jurisdictions, exacerbating the overinclusiveness that contributes to §5's being an unconstitutional exercise of remedial power. At a minimum, the Court should reject the district court's constriction of the bailout statute, which makes bailout unavailable to the district and thousands of other entities, including most counties covered by §5.

As discussed further below, the district court's holding on §5's constitutionality conflicts with the Court's consistent view that Congress has the power to enforce prophylactic remedies under the Fourteenth or Fifteenth Amendments only to the extent the statute maintains "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S., at 518. The 2006 enactment of §5 reimposed without significant modification a decades-old prophylactic remedy that in no way matched the scope of the injury it purported to remedy upon numerous jurisdictions with no history of VRA violations within the past 30 years. The statute would be irretrievably overbroad and unconstitutional if bailout were restricted only to counties, parishes, and entities that register voters, denying recourse to the thousands of municipalities and special-purpose districts otherwise qualified to escape preclearance. The concern that the statute is not congruent and proportional might, however, be

somewhat diminished if all jurisdictions with clean records can bail out. See *Boerne*, 521 U.S., at 533. But the district court adopted an interpretation ensuring §5 remains far too broad and incongruent to withstand constitutional scrutiny.

Restricting bailout eligibility to a county level makes bailout practically unworkable and unachievable in most States, including Texas. A county seeking bailout must prove that every city, town, school district, or other governmental entity within its boundaries has, for ten years, fully complied with all statutory conditions for bailout. Under the district court's interpretation, for the district to bail out, Travis County—the county in which the district is geographically located but that has no political control over the district—would have to research the activities of at least 107 geographically smaller government units for the previous ten years. SJEx.14 at 7. That monumental task would be complicated by the reality that in most states, including Texas, counties have no authority to compel entities like MUDs to comply with preclearance requirements or even to share information with the county about their compliance. See, *e.g.*, Tex. Water Code ch. 54 (providing that MUDs operate under the authority of the State of Texas and that counties have no binding control over a MUD's creation or operation). That Congress provided jurisdictions with a vehicle for bailout means nothing unless Congress also handed over the keys.

Aside from the practical impossibility of bailout under the district court's interpretation, the district court's version of §4(a) heightens the federalism burden inherent in the preclearance-bailout regime by impermissibly reordering state government. Specifically, under the district court's interpretation, §4(a) interposes Travis County between the district and the State of Texas—the district's only supervisory authority under state law.

That a few jurisdictions have achieved bailout is no indication that the district court's version of §4(a) is sufficiently robust to render §5 a congruent and proportional remedy. Rather, the fact that bailout has been achieved only by fourteen jurisdictions, all in Virginia, demonstrates the practical impossibility of bailing out for the majority of covered counties outside Virginia. Unlike most States, Virginia uniquely structures its local government so that counties and independent cities contain few, if any, smaller governmental units. See Va. Code §15.2-1500(A). Nothing in the legislative history or text of the 1982 or 2006 enactments suggests that Congress intended the bizarre result that bailout be a remedy exclusive to Virginia.

Moreover, the suggestion that Congress could not have intended to make entities like the district eligible for bailout because permitting non-county political subdivisions to seek bailout would create a crushing number of filings proves too much. If thousands of political subdivisions in covered jurisdictions can satisfy the bailout requirements,

justice—and the Constitution—demand that they be entitled to bailout. Further, the prospect of numerous small entities petitioning for bailout one at a time is not nearly as farfetched or judicially onerous as that of a State seeking bailout on behalf of all the thousands of jurisdictions within its borders at one time, which §4(a) indisputably contemplates.

II. In Any Event, §5's Preclearance Requirement Cannot Constitutionally Be Applied to the District.

A. The District Court's Confusion over the Proper Standard for Reviewing Congress's 2006 Reenactment of §5 Demonstrates the Need for the Court to Confirm the Standard for Legislation Enforcing the Fourteenth and Fifteenth Amendments.

In 1966, the Court upheld the original enactment of §5 as "an uncommon exercise of congressional power" justifiable as an extraordinary response to an extraordinary problem employing "legislative measures not otherwise appropriate." *Katzenbach*, 383 U.S., at 334. A scant 14 years later, the Court refused to overrule *Katzenbach*'s holding that the original enactment of §5 was constitutional in light of the extraordinary circumstances that *Katzenbach* had found essential to that determination. *City of Rome* v. *United States*, 446 U.S. 156, 174-178 (1980). At the same time, it upheld a modest seven-year extension of §5 given Congress's findings that progress in

the ten years since the Voting Rights Act's original passage had been "limited and fragile." *Id.*, at 180-181.

The Court has subsequently elaborated on its test for evaluating whether an act is an appropriate exercise of Congress's powers to remedy and prevent state violations of rights secured by the Reconstruction Amendments. Drawing explicitly on *Katzenbach*'s analysis of Congress's "remedial" powers under §2 of the *Fifteenth* Amendment, *Boerne*, addressing the substantively identical §5 of the *Fourteenth* Amendment, articulated a more refined methodology for making that determination. *Boerne*, 521 U.S., at 519-520; see also *id.*, at 525-527. Specifically, *Boerne* explained that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *id.*, at 520, and laid down a three-step analytical process for courts to follow in determining the constitutional validity of prophylactic legislation enacted pursuant to §5 of the Fourteenth Amendment or §2 of the Fifteenth Amendment, see, *e.g.*, *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368, 372 (2001).

The Court should use this case to confirm that one standard applies to enactments under the Fourteenth or Fifteenth Amendments and that core federalism principles require rigorous adherence to that standard. Emboldened by the fact that the Court has not expressly applied the congruence-and-proportionality test to a Fifteenth Amendment enactment after *Boerne*, the district court proceeded

to analyze preclearance's constitutionality from two fatally flawed premises. First, ignoring that *Boerne* expressly relied on, affirmed, and elaborated on *Katzenbach*'s analysis, the district court imagined the two cases imposed completely different standards. Relatedly, ignoring that *Boerne*'s Fourteenth Amendment analysis relied on *Katzenbach*'s Fifteenth Amendment analysis, the court concluded that *Katzenbach*'s purportedly different and presumably less stringent standard applied to Fifteenth Amendment enforcement powers.

Mistakenly viewing *Katzenbach* and *Boerne* as "articulat[ing] two distinct standards for evaluating the constitutionality of laws enforcing the [Reconstruction] Amendments," App.32, the district court gave three reasons for applying what it saw as *Katzenbach*'s "earlier and less demanding test," App.33, rather than the purportedly "more restrictive congruence and proportionality test" of *Boerne*, App.46. First, the court asserted that *Boerne* and cases following it "never state that *Katzenbach*'s and *City of Rome*'s more deferential standard no longer governs constitutional challenges to statutes aimed at racial discrimination in voting." App.46. Second, the court believed that "the basic concerns animating the *City of Boerne* cases do not apply to legislation designed to prevent racial discrimination in voting." App.47. Finally, it viewed *Boerne*'s elaboration of the *Katzenbach* standard as limited to legislation enacted pursuant to §5 of the Fourteenth Amendment and

simply inapplicable to measures like the VRA enforcing the Fifteenth Amendment. App.50-55.

None of those reasons provides a valid basis for refusing to apply the congruence-and-proportionality standard this Court has mandated for evaluating congressional power to enforce the guarantees of the Reconstruction Amendments. First, as already discussed, the congruence-and-proportionality test is not a "distinct standard" in opposition to *Katzenbach*'s more deferential one, App.32-33, but rather a further elaboration of the same standard. Second, because §5 sweeps far beyond the purposeful discrimination necessary to violate either the Fifteenth or Fourteenth Amendments to ensnare and preempt a massive number of constitutionally benign state voting enactments, it poses precisely the risk addressed by *Boerne*, that in enacting prophylactic legislation to prevent and remedy purported violations, Congress would instead rewrite the substantive scope of the Reconstruction Amendments. See *Boerne*, 521 U.S., at 519 ("Congress does not enforce a constitutional right by changing what the right is."). The district court's contrary conclusion rests on an overly broad view of the purportedly unconstitutional conduct §5 prevents—"racial discrimination," rather than *purposeful* racial discrimination—and a conflation of §5 with the entirety of the VRA. App.48-49. And finally, the Court has never indicated that the congruence-and-proportionality test is not equally applicable to both the Fourteenth and Fifteenth

Amendments. See *Garrett*, 531 U.S., at 373, n.8; *Boerne*, 521 U.S., at 518; see also *Lopez*, 525 U.S., at 294, n.6 ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as coextensive.").

This case presents the perfect vehicle for the Court to confirm beyond equivocation, for the guidance of Congress and the lower courts, that its well-elaborated congruence-and-proportionality standard applies to Congress's remedial enactments under either amendment. Further, this case provides the opportunity to make clear that the test applies with unmitigated force to a new enactment of a previously enacted remedial provision, especially when the temporary, "emergency" nature of the provision's previous incarnations was critical to the Court's finding those enactments were congruent and proportional remedies.

B. The 2006 Enactment of §5 Does Not Satisfy the Congruence-and-Proportionality Standard.

In addition to clarifying that the standard elaborated in *Katzenbach*, *Boerne*, and their progeny is a single standard that applies to §5, the Court should hold that the 2006 reenactment of §5 does not satisfy that standard. The Court has repeatedly held that when Congress legislates to enforce the Reconstruction Amendments it may not rewrite their substantive scope. The distinction between

"prophylactic legislation" that purports to preempt or remedy constitutional violations and "substantive redefinition of the . . . right at issue" must be respected. *Kimel* v. *Fla. Board of Regents*, 528 U.S. 62, 81 (2000); see *Boerne*, 521 U.S., at 520.

For prophylactic legislation to constitute a valid exercise of congressional power, rather than an invalid redefinition of constitutional rights, Congress must "identify conduct transgressing the . . . substantive provisions" it seeks to enforce and "tailor its legislative scheme to remedying or preventing such conduct." *Fla. Prepaid Postsecondary Educ. Expense Board* v. *Coll. Sav. Bank*, 527 U.S. 627, 639 (1999). To justify prophylactic legislation under that standard, Congress must compile a "legislative record" that demonstrates a "history and pattern" of constitutional violations of the right Congress purports to enforce. *Garrett*, 531 U.S., at 368; accord *Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 729 (2003). Considered in light of that record, the legislative measures selected must not be "so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S., at 532. Put most simply, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520.

In decisions elaborating the congruence-and-proportionality standard after *Boerne*, a three-part process has emerged for

evaluating congressional action to enforce the Reconstruction Amendments. First, a reviewing court must identify the "metes and bounds of the constitutional right in question," *Garrett*, 531 U.S., at 368, with "some precision," *id.*, at 365. Then, the court must ask "whether Congress identified a history and pattern," *id.*, at 368, of "widespread and persisting deprivation[s]" of the relevant right, *Boerne*, 521 U.S., at 526. Finally, the court must determine whether the statutory remedy is congruent and proportional to the constitutional right Congress purports to enforce. *Garrett*, 531 U.S., at 372.

1. Section 5 Is Not Appropriate Prophylactic Legislation If It Is Not Congruent and Proportional to Violations of the Right to Be Free of Purposeful Discrimination in Voting.

In reenacting §5 in 2006, Congress clearly stated its purpose was "to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution." Pub. L. No. 109-246, §2(a), 120 Stat. 577. The Fifteenth Amendment sets forth the basic guarantee of the constitutional right to vote free of discrimination: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The substantive right guaranteed by the Fifteenth Amendment and invoked by Congress in reauthorizing the VRA is one only against "purposefully discriminatory denial or abridgment by government of the freedom to vote." *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980) (plurality op.). To the extent the VRA could also be justified as legislation enforcing a distinct guarantee of the Equal Protection Clause of the Fourteenth Amendment, the substantive right protected by that constitutional guarantee is likewise against purposeful, governmental racial discrimination. See *id.*, at 66; *Shaw* v. *Reno*, 509 U.S. 630, 641 (1993). In either case, the constitutional violations for which §5 could be justified as either prophylaxis or remedy require *purposeful* discrimination, that is, measures implemented with both the intent and effect of denying access to the ballot because of the voter's race or color.

Section 5—by design—sweeps far beyond such direct violations of the Fifteenth and Fourteenth Amendment guarantees. Section 5 is paradigmatic prophylactic legislation, preventing enforcement of unconstitutional voting changes before any voter's rights are violated by prohibiting covered governmental entities from putting into practice any changes to voting laws or practices without prior federal approval. See *Connor* v. *Waller*, 421 U.S. 656, 656 (1975) (*per curiam*). But only a vanishingly small proportion of enactments subject to preclearance is found to abridge the right to be free from discrimination in voting; the vast majority of activity

triggering §5's preclearance requirement is constitutionally benign.

In order to justify this massive overbreadth in light of §5's clear intrusion onto traditional state legislative prerogatives, Congress had to adduce a legislative record sufficient to demonstrate a nexus between requiring thousands of covered jurisdictions to seek federal permission for every change affecting voting, however minute, though virtually all such changes will be found benign, and preventing purposeful discrimination in voting based on race or color. Congress did not do so.

2. In Reenacting §5, Congress Failed to Identify Relevant Constitutional Violations Sufficient to Form a History or Pattern of Discrimination.

The §5 prophylaxis "stands alone in American history in its alteration of authority between the federal government and the states and the unique procedures it requires of states and localities that want to change their laws." Persily, Promise, *supra*, at 177. It injects the federal government directly into the heart of the legislative and administrative processes of state and local governments, imposing a presumption of constitutional guilt on broad swaths of the country to preempt state and local legislative acts. No other provision judged under the congruence-and-proportionality standard has ever reached so far; the invasion of state sovereign

interests worked by §5 is far deeper than a mere abrogation of sovereign immunity or prescription of standards of conduct by state governments. To justify such extremity and its extension for another 25 years, one might anticipate Congress would seek to provide evidence of present-day actions by state and local governments that show the continued existence of the extraordinary circumstances that *Katzenbach* held necessary to support the initial imposition of §5 for only five years. Congruence and proportionality may not require that conditions in 2006 exactly mirrored those in 1965, but Congress needed some evidence before it that circumstances were at least remotely similar. See *Garrett*, 531 U.S., at 369. The record compiled by Congress in passing the 2006 reauthorization of §5, however, while voluminous, is woefully inadequate to satisfy the constitutional standard.

Most importantly, justifying §5 as a remedy requires no mere showing that discrimination in voting continues to exist. Showing that this uniquely broad and intrusive prophylactic is *tailored* to constitutional violations, see *Fla. Prepaid*, 527 U.S., at 639, requires showing the persistence of a particular type of conduct—specifically, a type of gamesmanship that once made case-by-case adjudication of voting-rights violations impracticable in some regions. As *Katzenbach* explained, §5 is not targeted to discriminatory conduct in general but to "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating

voting discrimination in the face of adverse federal court decrees." 383 U.S., at 335. That is, "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer* v. *United States*, 425 U.S. 130, 140 (1976). The 1965 Congress that enacted the first §5, in other words, confronted a constitutional "game of Whac-A-Mole," in which new violations popped up as soon as the Department of Justice tamped old ones down. Transcript of Oral Argument at 47, *Riley* v. *Kennedy*, 128 S.Ct. 1970 (2007) (No. 07-77) (argument by Pamela S. Karlan). It is only circumstances in which case-by-case adjudication cannot be relied upon to break a vicious cycle of unconstitutional state conduct that could justify abandoning the traditional concept of prosecuting constitutional violations when they ripen in favor of a preemptive federal veto of all related state enactments. See *Beer*, 425 U.S., at 140. Yet the record compiled by Congress actually negates the existence of such extraordinary circumstances, demonstrating, for example, that in many covered jurisdictions minority registration and turnout rates exceed both national averages and rates for white citizens. See S. Rep. No. 109-295, at 8 (2006); H.R. Rep. No. 109-478, at 12 (2006).

The 2006 congressional record simply contains no hint of pervasive, persistent gamesmanship within covered jurisdictions like that found to prevail before 1965. Even the handful of anecdotes identified by

defendants below are little evidence of even an isolated "extraordinary stratagem of contriving new rules," *Katzenbach*, 383 U.S., at 335, but rather isolated examples of the unextraordinary "stratagem" of trying to commit the same mistake repeatedly.

Neither racially polarized voting, which Congress viewed as "the clearest and strongest evidence" of "continued resistence [*sic*] within covered jurisdictions to fully accept[ing] minority citizens and their preferred candidates into the electoral process," H.R. Rep. No. 109-478, at 34, nor objections or information requests by the Department of Justice in response to preclearance submissions evidences a pattern of widespread and persisting constitutional violations relevant to the §5 remedy. Racially polarized voting, which is not state action, see *Rogers* v. *Lodge*, 458 U.S. 613, 647, n.30 (1982) (Stevens, J., dissenting), differs drastically from the plethora of pre-1965 procedural barriers that were used to deny the right to vote and is not remedied by §5 in any event. And because of the miniscule rate of objections and the significant increase in the number of submissions over time, there is "very little in the DOJ evidence that Congress could use to support a case for a renewed Section Five." Hasen, Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane, 66 Ohio St. L.J. 177, 193 (2005). Nor, finally, does the handful of isolated examples of actual purposeful discrimination peppering the congressional record demonstrate the gamesmanship that §5 nominally addresses because

these instances are generally widely separated in time, involve easily preventable repetition of already objected-to conduct rather than bad-faith attempts to stay one step ahead of federal court decrees, or both. Put simply, although Congress found that racially polarized voting and other "second generation" barriers to full minority participation in voting still exist and that certain vestiges remain of the discrimination previous Congresses found, see Pub. L. No. 109-246, §2(b)(2), §§3-4, 120 Stat. 577, in 2006, Congress did not find that the same level of "first generation" barriers still exist or, more importantly, that any covered or noncovered entities have recently engaged or are likely to engage in the kind of discriminatory gamesmanship on which the original passage of §5 was grounded and to which the Court has looked in upholding the constitutionality of §5's prior enactments.

3. Section 5 Is Neither a Congruent nor Proportional Response to the Few Relevant, Congressionally Identified Violations of the Rights §5 Purports to Enforce.

"The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Boerne*, 521 U.S., at 530. And the pervasiveness of even the same harm may change over time and must be assessed as of the most recent congressional

enactment of the remedial provisions. See *Garrett*, 531 U.S., at 369, n.6; *Boerne*, 521 U.S., at 530. Thus, the constitutionality of the 2006 reenactment of §5 is not settled by the Court's determinations in *Katzenbach* and *Rome* that prior incarnations of the measure were constitutionally enacted in 1965 or 1975. Nor does the Court's approbation of Congress's 1965 and 1975 actions in *Boerne* and subsequent cases suggest that the congressional authority to reenact and extend §5 in 2006 is a settled question. Rather, the constitutionality of Congress's 2006 enactment of §5 must be evaluated on its own terms, in light of conditions as they were at the time of Congress's passage of the reauthorization act, against the tailoring requirements of congruence and proportionality.

a. The Reenacted §5 Is Neither Geographically Targeted to Reach Actual Violations nor Otherwise Congruent to the Present-Day Contours of Voting Discrimination.

Congruence under *Boerne* evaluates the correspondence or tailoring of a legislative measure like §5 to the scope of the harm it seeks to address. But §5, reenacted without any revisiting of its coverage formula in light of present-day circumstances, is tailored only to the pattern of constitutional violations that existed in the 1960s and 1970s. The coverage of §5, determined by a formula initially crafted forty-one years before Congress's

reenactment, bears no more meaningful relationship to the problem of voting discrimination as it existed in 2006 than if Congress had decided covered jurisdictions by playing pin-the-tail-on-the-donkey.

In 1965 and 1975, the timeliness of the statistical proxies that govern §5's coverage formula—namely, voter registration and turnout, coupled with the use of literacy tests or other devices to bar minority voters—provided a meaningful geographic restriction, confining §5's effect "to those regions of the country where voting discrimination had been most flagrant." *Boerne*, 521 U.S., at 532-533. But literacy tests and other such devices have not been used by any jurisdiction in decades and are permanently and validly banned. 42 U.S.C. §1973*aa*. Worse, Congress's use of the same 34-years-stale registration and turnout figures to define the coverage formula applicable to the 2006 reenactment of §5 transforms that formerly meaningful geographic restriction into an arbitrary and meaningless one. And the divergence between the formula and present circumstances grows wider each day. Notably, this coverage formula will reach the venerable age of 66 before it next expires. See 42 U.S.C. §1973*b*(a)(8).

But Congress in 2006 made no serious effort to determine if proxy measurements of voting registration and turnout based on data gathered no later than 1972 bore any relation to conditions prevailing in the United States in 2006. Had Congress attempted to use comparable data from the 2000 and 2004 election cycles, the contours of the §5

remedy would differ drastically, particularly if the coverage formula took account of localized, rather than merely statewide, conditions. See 152 Cong. Rec. H5180 (daily ed. July 13, 2006) (statement of Rep. Norwood). Nor did Congress engage in any meaningful comparison between jurisdictions covered prior to 2006 and noncovered jurisdictions; its findings were limited instead to generalized, conclusory statements regarding "the continued need for Federal oversight in jurisdictions covered by the Voting Rights Act of 1965 since 1982." Pub. L. No. 109-246, §2(b)(5), 120 Stat. 577. Congress accordingly had no reasonable basis to conclude that jurisdictions identified by the coverage formula and subjected to the burdens of preclearance are any worse with respect to the constitutional right at issue than those jurisdictions that are not.

b. Section 5 Is Overly Intrusive in Proportion to the Volume and Intensity of Relevant Violations and Lacks Any Meaningful Time or Scope Limitations.

Congress clearly possesses "authority both to remedy and to deter violation of rights guaranteed [by the Reconstruction Amendments] by prohibiting a somewhat broader swath of conduct" than is directly forbidden by the Constitution. *Kimel*, 528 U.S., at 81. But while not every instance of remedial legislation "requires termination dates, geographic restrictions, or egregious predicates," nevertheless, when "a

congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate" under the Reconstruction Amendments. *Boerne*, 521 U.S., at 533. Section 5 has precisely such a pervasively prohibitory effect—it does not merely prohibit some voting changes that are constitutionally benign; it requires *all* changes affecting voting, broadly conceived, to be vetted by the federal government before enforcement.

Against the facts that the vast majority of activity it reaches is not unconstitutional, and that what proportion it does reach is already prohibited by §2 of the VRA, is weighed the substantial burden on constitutional values of federalism and state authority over law- and policymaking processes that lie at the very heart of the States' status as sovereign entities. Section 5 simply has no parallel as an intrusion by the federal government into the sovereignty reserved to the States in the constitutional structure. And in light of the dramatic overbreadth of its effect on constitutional enactments by state and local governments, §5 as a remedy is out of all proportion to the instances of purposeful discrimination in voting, and specifically to the nonexistent instances of modern gamesmanship in state voting laws directed at avoiding obligations imposed by the Fifteenth Amendment, that were

identified by Congress in passing the 2006 reauthorization act.

This disproportion is aggravated by the absence of any significant limitation on §5's sweep. Although §5 is geographically restricted, its arbitrarily defined coverage formula renders this limitation incongruent to present-day problems. Equally problematic, the interpretation of §4(a)'s bailout provision indulged by the district court would make bailout impossible for the vast majority of covered jurisdictions, see App.20-30, making illusory a feature the Court has previously viewed as a critical safety valve in analyzing §5's constitutionality, see *Boerne*, 521 U.S., at 533.

Nor does it appear that Congress any longer regards §5 as the temporary emergency measure it was originally enacted to be. Although the 2006 reenactment purports to set a date terminating §5's burden on state and local governments 25 years later, this is the second 25-year extension and the fourth extension overall. In aggregate, the original five-year response to the emergency circumstances of 1965 has been extended by an additional six decades, and if the anemic record Congress relied upon to justify reenactment of §5 in 2006 is held sufficient, there is no reason to believe Congress would not simply extend its lifespan in quarter-century increments in perpetuity.

If §5 may be perpetually renewed based on ever-more-stale evidence while jurisdictions like the

district remain unable to escape preclearance in any achievable manner, §5, like RFRA before it, effectively "has no termination date or termination mechanism." *Boerne*, 521 U.S., at 532. Section 5, as reenacted by Congress in 2006, is thus unconstitutionally disproportionate to the record compiled by Congress.

C. Even If Rational-Basis Review Were the Proper Standard for Evaluating Congressional Efforts to Enforce the Fifteenth Amendment, §5 Remains Constitutionally Inadequate.

Even adjudged under the district court's incorrect conception of the "less demanding" standard *Katzenbach* provides for reviewing legislation enforcing the Fifteenth Amendment, App.33, the 2006 reenactment of §5 exceeded Congress's authority. As detailed above, the 2006 Congress had no evidence of a pattern of "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees," *Katzenbach*, 383 U.S., at 335, like that amassed by Congress in 1965. Further, even if the preclearance mechanism could be viewed as a rational means of preventing generalized purposeful discrimination in voting on the basis of race or color, the scope of its 2006 application is arbitrary and irrational because the decades-stale data underlying the original coverage

formula bear no relation whatsoever to present-day conditions.

Given Congress's failure to make any meaningful comparison between present-day conditions in covered and noncovered jurisdictions, Congress had no basis derived from any rational deliberation for its evident and wrongly held belief that statistics on state and local voter registration and turnout in the 1968 and 1972 presidential elections could identify pockets of voting discrimination persisting in modern America or could exclude from §5's ambit anything close to a preponderance of jurisdictions in which such discrimination is not present. Because the 2006 reenactment of §5 perpetuated this arbitrary and irrational nationwide pattern of its application to state and local governments, §5 fails to pass muster even under the rational-basis standard of review incorrectly selected by the district court.

CONCLUSION

For these reasons, the Court should note probable jurisdiction.

Respectfully submitted,

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September 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, Plaintiff, v. MICHAEL B. MUKASEY, Attorney General of the United States, *et al.*, Defendants.	Civil Action No. 06-1384 Three-judge court (PLF, EGS, DST)

Before: FRIEDMAN and SULLIVAN, *District Judges*, and TATEL, *Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

OPINION

(Filed May 30, 2008)

TATEL, *Circuit Judge*: Section 5 of the Voting Rights Act of 1965 prohibits "covered jurisdictions" – those states and political subdivisions with histories of racial discrimination in voting – from making any change in their voting procedures without first demonstrating to either the Attorney General or a three-judge panel of this court that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Plaintiff, a municipal utility

district in Texas, a covered jurisdiction, seeks a declaratory judgment exempting it from section 5's "preclearance" obligation. In the alternative, plaintiff challenges section 5's constitutionality, arguing that when Congress extended the provision in 2006 it lacked sufficient evidence of racial discrimination in voting to justify the provision's intrusion upon state sovereignty. We reject both claims. First, plaintiff is ineligible to seek a declaratory judgment exempting it from section 5 because it does not qualify as a "political subdivision" as defined in the Voting Rights Act. Second, applying the standard set forth by the Supreme Court in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), we conclude that given the extensive legislative record documenting contemporary racial discrimination in voting in covered jurisdictions, Congress's decision to extend section 5 for another twenty-five years was rational and therefore constitutional. Alternatively, we conclude that section 5's extension was constitutional even if, as plaintiff argues, its challenge is controlled by the stricter standard set forth in *City of Boerne v. Flores,* 521 U.S. 507 (1997). Given section 5's tailored remedial scheme, the extension qualifies as a congruent and proportional response to the continuing problem of racial discrimination in voting.

This opinion is organized as follows. Part I describes the background of this case, including the Voting Rights Act's passage and key provisions; the two decisions in which the Supreme Court sustained section 5's constitutionality, *Katzenbach* and *City of*

Rome v. United States, 446 U.S. 156 (1980); the 2006 extension of section 5, which plaintiff challenges here; and the convening of this three-judge panel. *See infra* pp. 3-16 . In Part II we explain why plaintiff is ineligible to seek a declaratory judgment exempting it from section 5. *See infra* pp. 16-23. In Part III we explain why we believe plaintiff's constitutional challenge is facial and why that challenge is governed by the standard set forth in *Katzenbach*. *See infra* pp. 24-44. Applying the *Katzenbach* standard in Part IV, we explain why Congress's decision to extend section 5 for another twenty-five years was constitutional. *See infra* pp. 45-93. In Part V we explain why section 5's extension survives even *City of Boerne's* more demanding test. *See infra* pp. 93-113. And finally, in Part VI we consider and reject two arguments plaintiff makes that could be construed as an as-applied challenge to section 5. *See infra* pp. 113-20.

I.

Ratified in 1870 after the Civil War, the Fifteenth Amendment guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. Yet following Reconstruction, "[t]he blight of racial discrimination in voting . . . infected the electoral process in parts of our country for nearly a century." *Katzenbach*, 383 U.S. at 308. "Beginning in 1890," southern states

"enacted tests . . . specifically designed to prevent Negroes from voting," making "the ability to read and write a registration qualification." *Id.* at 310-11. Black citizens faced many other obstacles, including property qualifications, good character tests, and "[d]iscriminatory administration of voting qualifications." *Id.* at 311-12. Congress eventually responded with the Civil Rights Acts of 1957, 1960, and 1964, each of which "tried to cope with the problem by facilitating case-by-case litigation against voting discrimination." *Id.* at 313. This case-by-case approach, however, did "little to cure the problem." *Id.* Convinced that it confronted "an insidious and pervasive evil . . . perpetrated . . . through unremitting and ingenious defiance of the Constitution," Congress decided to adopt "sterner and more elaborate measures," *id.* at 309, by enacting a "complex scheme of stringent remedies aimed at areas where voting discrimination ha[d] been most flagrant," *id.* at 315. As a result, after building a "voluminous legislative history" during eighteen days of committee hearings and twenty-nine days of floor debate, Congress, acting pursuant to section 2 of the Fifteenth Amendment – "Congress shall have power to enforce this article by appropriate legislation," U.S. CONST. amend. XV, § 2 – approved the Voting Rights Act of 1965 by wide margins in both chambers. *Katzenbach*, 383 U.S. at 308-09; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1) ("1965 Act").

Section 2 of the Voting Rights Act contains the statute's basic prohibition: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973. Other provisions of the statute strengthen the equitable powers of federal courts, authorize civil and criminal penalties, and outlaw poll taxes. *See* 42 U.S.C. §§ 1973a(c), 1973h, 1973i(d), 1973j.

Unlike those provisions, which apply nationwide and are permanent, certain sections of the Act are temporary and apply only to states and political subdivisions with particularly egregious histories of racial discrimination in voting. In such "covered" jurisdictions, section 4(a) bans the use of any test or device to deny the right to vote. As originally enacted, the statute defined "test or device" as any requirement that a prospective voter "(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 1965 Act § 4(c), 79 Stat. at 438-39 (codified at 42 U.S.C. § 1973b(c)).

In addition to section 4(a), covered jurisdictions are subject to section 5 – the provision challenged in this case. Section 5 prohibits any and all changes in

voting regulations pending review and approval by the federal government in a process known as preclearance. 42 U.S.C. §§ 1973b, 1973c. To obtain preclearance of a proposed change under section 5, covered jurisdictions may either submit the proposed change to the United States Attorney General or seek a declaratory judgment from a three-judge panel of this court. 42 U.S.C. § 1973c. Under section 5, the Attorney General or the district court may preclear the change only if it "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." *Id.* If the Attorney General interposes no objection after sixty days or if the district court grants a declaratory judgment, the jurisdiction may implement the change. Absent preclearance, covered jurisdictions may not modify any existing voting qualifications, standards, practices, or procedures. Another provision applicable only in covered jurisdictions authorizes the Attorney General to appoint federal election observers. 42 U.S.C. § 1973f.

To determine which jurisdictions would be covered, Congress adopted a formula that utilized two proxies for discrimination. Specifically, section 4(b) originally provided that the requirements of sections 4(a) and 5 would apply to any state or political subdivision that both: (1) according to the Attorney General maintained a test or device on November 1, 1964; and (2) according to the Director of the Census had registration or turnout rates below fifty percent of the voting age population in November 1964. 1965 Act

§ 4(b), 79 Stat. at 438 (codified as amended at 42 U.S.C. § 1973b(b)). This two-part coverage formula resulted in most southern states becoming covered jurisdictions. Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia were covered statewide. *See* 28 C.F.R. pt. 51 app. Thirty-nine of North Carolina's one hundred counties and one Arizona county also qualified for coverage as separately designated political subdivisions. *See id.*

Recognizing that section 4(b)'s formula could prove either over- or under-inclusive, Congress incorporated two procedures for adjusting coverage over time. First, as originally enacted, section 4(a) allowed jurisdictions to earn exemption from coverage by obtaining from a three-judge panel of this court a declaratory judgment that in the previous five years they had not used a test or device "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." 1965 Act § 4(a), 79 Stat. at 438 (codified as amended at 42 U.S.C. § 1973b(a)). This "bailout" provision, as subsequently amended, addresses potential statutory over-inclusiveness, allowing jurisdictions with clean records to terminate their section 5 preclearance obligation. Second, section 3(c) authorizes courts to require preclearance by any noncovered state or political subdivision found to have violated the Fourteenth or Fifteenth Amendment. 42 U.S.C. § 1973a(c). Specifically, courts presiding over voting discrimination suits may "retain jurisdiction for such period as [they] may deem appropriate" and order that during

that time no voting change take effect unless either approved by the court or unopposed by the Attorney General. *Id.* This judicial "bail-in" provision, known as a pocket trigger, addresses the formula's potential under-inclusiveness.

Less than two months after Congress passed the Voting Rights Act, South Carolina, invoking the Supreme Court's original jurisdiction, challenged the statute's constitutionality. The Court granted South Carolina leave to file a complaint, expedited the case, and invited other states to participate as *amici curiae*. South Carolina argued that certain provisions of the Voting Rights Act, including the coverage formula, the test or device ban, and section 5's preclearance requirement, "exceed[ed] the powers of Congress and encroach[ed] on an area reserved to the States by the Constitution." *Katzenbach,* 383 U.S. at 323. Rejecting these arguments, the Court held that Congress had properly exercised its enforcement power under section 2 of the Fifteenth Amendment. *See id.* at 327. The "fundamental principle" guiding the Court was this: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 324.

Four years after *Katzenbach,* and just before sections 4 and 5 were set to expire, Congress reauthorized and extended them for five years. Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 ("1970 Amendments"). It extended them again in 1975, this time for seven years, Pub. L. No. 94-73, § 101, 89 Stat. 400, 400

("1975 Amendments"), and then again in 1982, this time for twenty-five years, Pub. L. No. 97-205, § 2(b)(8), 96 Stat. 131, 133 ("1982 Amendments"). Prior to each extension, Congress held numerous hearings and heard extensive testimony documenting the continued existence of racial discrimination in voting.

These reauthorizations amended the Voting Rights Act in several important ways. Most relevant to this case, the 1975 Amendments added section 4(f), which bars voting discrimination against certain language minorities – specifically, persons of American Indian, Asian American, Native Alaskan, and Spanish heritage. 1975 Amendments §§ 203, 207, 89 Stat. at 401-02 (codified as amended at 42 U.S.C. §§ 1973b(f), 1973*l*(c)(3)). Acting pursuant to the Fourteenth Amendment, as well as the Fifteenth, Congress expanded the definition of "test or device" to include the provision of English-only voting materials in jurisdictions where more than five percent of voting-age citizens belonged to a single language minority. *Id.* § 203, 89 Stat at 401-02 (codified at 42 U.S.C. § 1973b(f)(3)). As in the case of the 1970 Amendments, which added references to the 1968 election, 1970 Amendments § 4, 84 Stat. at 315 (codified as amended at 42 U.S.C. § 1973b(b)), the 1975 Amendments expanded coverage to jurisdictions that met section 4(b)'s two-part test in 1972, at that time the most recent presidential election, 1975 Amendments § 202, 89 Stat. at 401 (codified at 42 U.S.C. § 1973b(b)). The statute thus covered any jurisdiction

that in 1972 used a test or device (including the provision of English-only voting materials to specified language minorities) and had registration or turnout rates below fifty percent. *See id.* §§ 203-204, 89 Stat. at 401-02 (codified at 42 U.S.C. § 1973b(b), (f)).

As a result of the 1975 language minority amendments, Texas, Alaska, and Arizona became covered, as did several counties in California, Colorado, Florida, New York, North Carolina, and South Dakota, plus two townships in Michigan. *See* 28 C.F.R. pt. 51 app. Section 4(f) requires these jurisdictions to provide all materials and information relating to the electoral process in the language of the applicable minority group as well as in English. 1975 Amendments § 203, 89 Stat. at 402 (codified as amended at 42 U.S.C. § 1973b(f)(4)). The Act's other requirements, including section 5, also apply to these most recently covered jurisdictions. *Id.* § 206, 89 Stat. at 402 (codified as amended at 42 U.S.C. §§ 1973-1973d, 1973k).

The 1975 Amendments, including their language minority provisions, were in effect in 1980 when the Supreme Court again upheld the constitutionality of section 5's preclearance requirement in *City of Rome v. United States*, 446 U.S. at 177-82. Rome, a municipality within the covered state of Georgia, argued that it was eligible for bailout and that section 5 was unconstitutional. The Court denied both claims, finding Rome ineligible to apply for bailout and "declin[ing] th[e] invitation to overrule Congress' judgment that the 1975 extension was warranted."

Id. at 180. Emphasizing Congress's finding that "minority political progress under the Act, though undeniable, had been modest and spotty," *id.* at 181 (internal quotation marks omitted), the Court concluded that Congress's "considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable," *id.* at 182.

The 1982 reauthorization amended the bailout mechanism in two respects. First, it sharply increased the number of jurisdictions eligible to pursue bailout. Previously, only states or separately designated political subdivisions (such as covered counties in noncovered states) could seek bailout. In the 1982 Amendments, however, Congress allowed political subdivisions *within* covered states to apply for bailout, even if such subdivisions had never been separately designated for coverage. 1982 Amendments § 2(b)(2), 96 Stat. at 131 (codified as amended at 42 U.S.C. § 1973b(a)(1)). Second, the 1982 Amendments altered the substantive requirements for bailout. To qualify for bailout under earlier versions of the Act, covered jurisdictions had to show that during some period of time – the previous five, ten, or seventeen years, depending upon the version of the Act then in effect – they had maintained no test or device and no court had found they had denied or abridged the right to vote. *See* 1965 Act § 4(a), 79 Stat. at 438; 1970 Amendments § 3, 84 Stat. at 315; 1975 Amendments §§ 101, 201, 206, 89 Stat. at 400-02. Because this

approach "offered no bailout opportunity for jurisdictions that eliminated discriminatory voting tests and practices that [had been] used at the time of initial coverage," Congress liberalized the standard to give even those jurisdictions with post-1965 histories of discrimination an incentive to improve their voting rights records. Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination,* 17 Urb. Law. 379, 381 (1985). To accomplish this, the 1982 Amendments require covered jurisdictions seeking bailout to demonstrate (among other things) that during the past ten years they used no test or device, were the subject of no judicial findings of racial discrimination in voting, successfully precleared all voting changes, and engaged in constructive efforts to eliminate intimidation and harassment of voters. *See* 1982 Amendments § 2(b)(4), 96 Stat. at 131-32 (codified at 42 U.S.C. § 1973b(a)(1)(A)-(F)); *see also id.,* 96 Stat. at 132-33 (codified at 42 U.S.C. § 1973b(a)(2)-(4)) (listing additional requirements). By early 2006, eleven counties and cities, all in Virginia, had successfully obtained exemptions under the new standards. Moreover, according to the Attorney General, no bailout applications have been denied since 1984, Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. at 29 ("Def.'s Opp'n"), the year in which the current procedures became effective, 1982 Amendments § 2(b), 96 Stat. at 131.

In October 2005, well before section 5 and the Act's other temporary provisions were set to expire,

Congress began considering whether to extend them once again. During several months of hearings, the House and Senate Judiciary Committees compiled a legislative record "no less extensive . . . than in prior years." H.R. REP. NO. 109-478, at 11 (2006). Because the constitutional question we face in this case turns in no small part on the care with which Congress approached its task, we quote in full the House Judiciary Committee's description of its work:

> H.R. 9 results from the development of one of the most extensive legislative records in the Committee on the Judiciary's history.
>
> LEGISLATIVE HISTORY OF H.R. 9
>
> *Oversight Hearings*
>
> Prior to introducing H.R. 9, the House Committee on the Judiciary held ten oversight hearings before the Subcommittee on the Constitution examining the effectiveness of the temporary provisions of the [Voting Rights Act ("VRA")] over the last 25 years. During these oversight hearings, the Subcommittee heard oral testimony from 39 witnesses, including State and local elected officials, scholars, attorneys, and other representatives from the voting and civil rights community. The Committee also received additional written testimony from the Department of Justice, other interested governmental and nongovernmental organizations (NGOs), and private citizens. In all, the Committee assembled over 12,000 pages of

testimony, documentary evidence and appendices from over 60 groups and individuals, including several Members of Congress.

In addition to the oral and written testimony, the Committee requested, received, and incorporated into its hearing record two comprehensive reports that have been compiled by NGOs that have expertise in voting rights litigation and extensively documented: (1) the extent to which discrimination against minorities in voting has and continues to occur; and (2) the continued need for the expiring provisions of the VRA. The Committee also requested, received, and incorporated into its record 11 separate reports that document the extent to which discrimination occurred in 11 of the 16 States covered in whole or in part under Section 4(b) over the last 25 years. Those reports also describe the impact that the VRA has had on protecting racial and language minority citizens from discriminatory voting techniques in those jurisdictions.

Legislative Hearings

In addition to ten oversight hearings, the Subcommittee on the Constitution held two legislative hearings on May 4, 2006, to examine H.R. 9. During these hearings, the Committee received oral and written testimony from seven additional witnesses concerning: (1) the impact that H.R. 9 will have on continuing the progress that minority groups have made in the last forty years and

> on protecting racial and language minority voters over the next 25 years; and (2) the need for H.R. 9 to update the VRA's temporary provisions, and to restore the VRA to its original intent so that it can continue to be an effective remedy in addressing the history and continuing vestiges of racial discrimination.

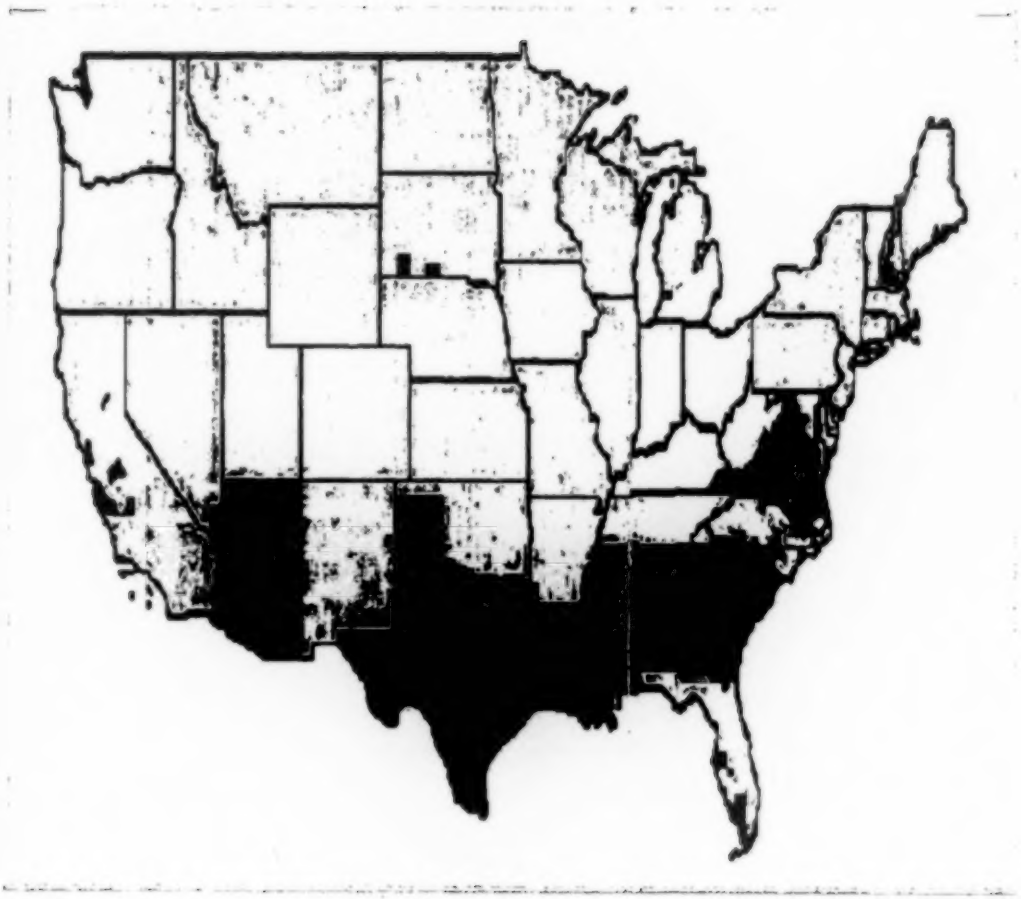
Id. at 5. The Senate Judiciary Committee undertook its own extensive hearings, resulting in a combined record "of over 15,000 pages." S. REP. NO. 109-295, at 10 (2006). One of the comprehensive reports Congress requested and relied heavily upon came from the National Commission on the Voting Rights Act, an entity "composed of a politically and ethnically diverse group of men and women, including former elected and appointed public officials, scholars, lawyers, and leaders." 1 *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 104, 121 (Mar. 8, 2006) ("1 *Evidence of Continued Need*") (appendix to statements of Bill Lann Lee and Joe Rogers), *available at* http://judiciary.house.gov/media/pdfs/printers/109th/26411v1.pdf. The Commission held ten hearings around the country, heard testimony from more than one hundred witnesses, and compiled a record of several thousand pages. *Id.* at 12, 110. The Commission's report, entitled *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005,* contains a number of maps, *id.* at 252-87, several of which we have included in this opinion. Map 1, on the next page, identifies all currently

covered jurisdictions (though it includes the Virginia counties and cities that have bailed out). *Id.* at 252.

Based on the extensive legislative record described above, Congress concluded that "vestiges of discrimination in voting continue to exist." Pub. L. No. 109-246, § 2(b)(2), 120 Stat. 577, 577 (2006) ("2006 Amendments"). According to the House Judiciary Committee, its "findings of continued efforts to discriminate against minority citizens in voting demonstrate that despite substantial improvements, there is a demonstrated and continuing need to reauthorize the temporary provisions." H.R. REP. NO. 109-478, at 53 (2006). As a result, in July 2006 Congress extended section 5 for an

MAP 1

Section 4(b) Covered Jurisdictions



Key: Covered Jurisdictions

- States Covered as a Whole
- Covered Counties in States Not Covered as a Whole
- Covered Townships in States Not Covered as a Whole

The entire state of Alaska is also covered. No jurisdiction in Hawaii is covered

Map created by the United States Department of Justice based on coverage determinations made by 28 C.F.R. Part 51, Appendix

additional twenty-five years. Entitled the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, the statute, which passed overwhelmingly in both chambers (unanimously in the Senate and by 390-33 in the House), overruled several Supreme Court decisions interpreting section 5's substantive test, but otherwise left the law virtually unchanged. 2006 Amendments, 120 Stat. at 577. President George W. Bush signed the bill into law on July 27, 2006.

Just days after the 2006 Amendments became effective, plaintiff Northwest Austin Municipal Utility District Number One filed this action. Created in the late 1980s to facilitate the development of a residential subdivision, the District is a local government entity in Texas that sits within the boundaries of Austin and Travis County but remains independent of both. Am. Compl. ¶ 6. The District provides infrastructure, waste and wastewater service, and other local services to its approximately 3,500 residents. *Id.*; Def.'s Statement of Uncontested Material Facts ¶¶ 45, 52. The five members of the District's board of directors serve staggered four-year terms, with elections held every two years. Def.'s Statement of Uncontested Material Facts ¶¶ 55, 58-59. Although counties control voter registration under Texas law, the District conducted its own board of directors elections until 2002. *Id.* ¶¶ 17-27, 120. Since then, Travis County, pursuant to a written agreement with

the District, has administered the District's elections at a shared polling place. *Id.* ¶¶ 28-34.

The District makes two claims in its amended complaint. Claim I seeks a declaratory judgment pursuant to section 4(a) exempting the District from section 5's preclearance requirement. Alternatively, Claim II alleges that section 5 "is an unconstitutional overextension of Congress's enforcement power to remedy past violations of the Fifteenth Amendment." Am. Compl. at p. 8. In his answer, the Attorney General argues that because the District is not a political subdivision as defined in the Act, it may not bail out under section 4(a). Def.'s Answer at 5. The Attorney General also defends the Act's constitutionality, arguing that renewal of section 5 represented a valid exercise of Congress's express authority to enforce the Fourteenth and Fifteenth Amendments. Mem. in Supp. of Def.'s Mot. for Summ. J. at 7 ("Def.'s Mem.").

As required by section 4(a), a district court of three judges was convened to hear the District's challenge. *See* 42 U.S.C. § 1973b(a)(5) ("An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."); 28 U.S.C. § 2284(b)(1) ("Upon the filing of a request for three judges, the judge to whom the request is presented shall . . . immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge."). Several parties

sought and received permission to intervene as defendants: Travis County, the Texas State Conference of NAACP Branches, the Austin Branch of the NAACP, People for the American Way, eleven District residents (David, Lisa, and Gabriel Diaz; Nicole and Rodney Louis; Wendy, Jamal, and Marisa Richardson; Yvonne and Winthrop Graham; and Nathaniel Lesane), and three residents from elsewhere in Texas (Jovita Casares, Angie Garcia, and Ofelia Zapata). The Brennan Center for Justice submitted an *amicus curiae* brief. Following extensive discovery, the parties filed cross-motions for summary judgment, and we heard oral argument on September 17, 2007. We express our gratitude to the parties and counsel for the cooperative and skilled manner in which they have conducted themselves throughout these important and complex proceedings, from discovery through briefing and oral argument.

II.

We begin with bailout. As noted above, section 5 requires covered jurisdictions to obtain federal approval for any change in voting procedures unless a three-judge panel of this court has issued a declaratory judgment terminating the jurisdiction's section 5 preclearance obligation. 42 U.S.C. § 1973c. Until 1982 section 4(a) limited bailout to two types of entities: (1) covered states, and (2) political subdivisions covered "as a separate unit." *See* 1965 Act § 4(a), 79 Stat. at 438; 1982 Amendments § 2(b)(2), 96 Stat. at 131 (codified at 42 U.S.C. § 1973b). According to section

14(c)(2), "[t]he term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 1965 Act § 14(c)(2), 79 Stat. at 445 (codified at 42 U.S.C. § 1973*l*(c)(2)). As a result, apart from covered states, only political subdivisions separately designated for coverage could seek bailout. So, for example, Texas could seek bailout as a covered state, as could certain counties in California, North Carolina, and other noncovered states (*see* Map 1, *supra* p. 13). But political subdivisions within covered states – such as Travis County, in which the District is located – could not apply for bailout despite meeting the section 14(c)(2) definition because they had never been separately designated for coverage. *See City of Rome,* 446 U.S. at 167 (finding city ineligible to seek bailout because "the coverage formula of § 4(b) ha[d] never been applied to it").

In 1982, however, Congress expanded bailout eligibility to include section 14(c)(2) political subdivisions within covered states. 1982 Amendments § 2(b)(2), 96 Stat. at 131 (codified at 42 U.S.C. § 1973b(a)(1)). It accomplished this by inserting the italicized language into section 4(a), which bans the use of tests or devices and identifies entities eligible to seek bailout:

> To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be

> denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section *or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit,* or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section.

Id. By including political subdivisions within covered states even though they had not been designated for coverage "as a separate unit," Congress made jurisdictions like Travis County eligible to seek bailout.

The District claims that although it does not qualify as a political subdivision under section 14(c)(2) – having never "conduct[ed] registration for voting," 42 U.S.C. § 1973*l*(c)(2) – it is nonetheless eligible to apply for bailout because Congress intended the term "political subdivision" as used in amended section 4(a) to carry its common meaning: "[a] division of a state that exists primarily to discharge some function of local government." BLACK'S LAW DICTIONARY 1197 (8th ed. 2004). As an undisputed subunit of Texas, the District claims, it easily

satisfies the common definition of political subdivision and thus qualifies to seek section 4(a) bailout even though it does not register voters. In support of this argument, the District relies on dictum from *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110 (1978), a voting rights case decided several years prior to the 1982 Amendments. There, emphasizing that section 4(a)'s ban on the use of tests or devices "operates '*in* any [designated] State . . . or *in* any [designated] political subdivision,'" *id.* at 120 (quoting 42 U.S.C. § 1973b(a)), the Court held that once a state has been designated for coverage, section 5's preclearance requirement applies to all political units within it regardless of whether the units qualify as section 14(c)(2) political subdivisions, *id.* at 122. As an aside, the Court noted – in a sentence crucial to the District's claim – that a similar result would follow where a separately designated political subdivision (rather than a state) was the covered entity because section 14(c)(2)'s definition "was intended to operate *only for purposes* of determining which political units in nondesignated States may be separately designated for coverage under § 4(b)." *Id.* at 128-29 (emphasis added). Reiterating this point in a nearby footnote, the Court said that "the *only limitation* § 14(c)(2) imposes on the Act pertains to the areas that may be designated for coverage." *Id.* at 129 n.16 (emphasis added).

Arguing that "[w]hen Congress amends a statute, it is presumed to be mindful of prior judicial interpretations of that statute," the District claims that when

Congress amended section 4(a) it did so in light of *Sheffield's* dictum that the only purpose of section 14(c)(2)'s definition is to identify which political subunits qualify for coverage in section 4(b). Pl.'s Mot. for Summ. J. with Mem. of P. & A. in Supp. of Mot. for Summ. J. at 19 ("Pl.'s Mem."). Although the District acknowledges that Congress can overrule the Supreme Court's interpretation of a statute simply by changing the law, *see, e.g., Ill. Brick Co. v. Illinois,* 431 U.S. 720, 736 (1977) ("[I]n the area of statutory construction . . . Congress is free to change this Court's interpretation of its legislation."), it points out that section 14(c)(2) underwent no change at all, meaning that Congress left *Sheffield's* limiting construction intact. *See* Pl.'s Mem. at 18. We disagree.

That Congress left section 14(c)(2) undisturbed does not resolve the question before us. Eligibility for bailout is governed by section 4(a), which, as noted above, Congress expanded in 1982 to include "any political subdivision of [a covered] State . . . , though [the coverage] determinations were not made with respect to such subdivision as a separate unit." 42 U.S.C. § 1973b(a)(1). Had Congress stopped at the comma, there might be some question as to whether it intended to use the term "political subdivision" in its broadest sense. But Congress did not stop at the comma. Instead, it added the phrase "though [the coverage] determinations were not made with respect to such subdivision as a separate unit." *Id.* This language demonstrates that Congress intended "political subdivision" to refer only to section 14(c)(2)

political subdivisions – that is, counties, parishes, and voter-registering subunits – since only "such subdivision[s]" can be separately designated for coverage. Under the District's interpretation, this language would be surplusage. *See, e.g., United States v. Menasche,* 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *Inhabitants of Montclair Twp. v. Ramsdell,* 107 U.S. 147, 152 (1883))). On its face, then, amended section 4(a) excludes political subunits – like the District – that do not register voters and thus could not have been separately designated for coverage.

The House and Senate Reports accompanying the 1982 Amendments further clarify that Congress intended the expanded bailout mechanism to encompass only section 14(c)(2) political subdivisions. The 1981 House Report states that the "standard for bailout is broadened to permit political subdivisions, *as defined in Section 14(c)(2),* in covered states to seek to bail out although the state itself may remain covered." H.R. REP. NO. 97-227, at 2 (1981) (emphasis added). Leaving no doubt about the issue, the same report observes that "[w]hen referring to a political subdivision this amendment refers only to counties and parishes except in those rare instances in which the county does not conduct vote[r] registration; only in such rare instances . . . can a jurisdiction smaller than a county or parish file for bailout." *Id.* at 39. The 1982 Senate Report not only includes almost identical language, *see* S. REP. NO. 97-417, at 2, 69 (1982), but

also explains why Congress expressly rejected the broad definition of political subdivision advanced by the District here:

> Towns and cities within counties may not bailout separately. This is a logistical limit. As a practical matter, if every political subdivision were eligible to seek separate bailout, we could not expect that the Justice Department or private groups could remotely hope to monitor and to defend the bailout suits. It would be one thing for the Department and outside civil rights litigators to appear in hundreds of bailout suits. It would be quite another for them to have to face many thousands of such actions because each of the smallest political subunits could separately bail out. Few questioned the reasonableness and fairness of this cutoff in the House.

Id. at 57 n.192. In support of its position, the District points to passages in the 1982 and 2006 committee reports encouraging covered jurisdictions to use the broadened bailout mechanism. *See, e.g.*, H.R. REP. NO. 109-478, at 58 (2006) (expressing "hope[ ] that more covered States and political subdivisions will take advantage of the [bailout] process"). None of these statements, however, even hints that political subdivisions outside section 14(c)(2)'s definition would qualify for bailout. Section 4(a)'s legislative history thus confirms what its plain language reveals: political subunits like the District are not qualified to seek bailout.

This conclusion is reinforced by post-1982 developments. In 1987 the Attorney General issued a regulation providing that only political subdivisions as defined in section 14(c)(2) may seek bailout. One provision of the regulation states that "a covered jurisdiction or a political subdivision of a covered State" may seek to terminate coverage, 28 C.F.R. § 51.5, while another clarifies that the regulation uses the term political subdivision "as defined in the Act" and quotes section 14(c)(2) in full, *id.* § 51.2. This matters for two reasons. First, the Supreme Court "traditionally afford[s] substantial deference to the Attorney General's interpretation of § 5 in light of [his] 'central role . . . in formulating and implementing'" the preclearance system. *Lopez v. Monterey County,* 525 U.S. 266, 281 (1999) (quoting *Dougherty County Bd. of Educ. v. White,* 439 U.S. 32, 39 (1978)) (citing cases). Second, when Congress reauthorized section 5 in 2006, it had every opportunity to override the Attorney General's 1987 interpretation, yet declined to do so. Not only was Congress aware of the regulation – it was contained in the legislative record – but it knew that eleven Virginia political subdivisions had relied on the regulation and successfully bailed out. *See* 2 *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 3364-74 (Oct. 25, 2005) ("2 *Section 5 History*"), *available at* http://judiciary.house.gov/media/pdfs/printers/109th/24120_vol.2.pdf; H.R. REP. NO. 109-478, at 93 (2006). Had Congress disagreed with the Attorney General's interpretation, "it presumably

would have clarified its intent when re-enacting the statute in [2006]." *Dougherty,* 439 U.S. at 38. Congress's silence on this matter is especially salient given that at least two witnesses urged Congress – unsuccessfully as it turned out – to expand bailout eligibility to encompass governmental subunits smaller than counties and parishes. *See Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field, Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary,* 109th Cong. 237 (June 21, 2006) ("*Reauthorizing the Voting Rights Act*") (statement of John J. Park, Jr.), *available at* http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=109_senate_hearings&docid=f:31269.pdf; *Voting Rights Act: An Examination of the Scope and Criteria for Coverage under the Special Provisions of the Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 91 (Oct. 20, 2005) ("*Examination of Scope and Criteria for Coverage*") (statement of J. Gerald Hebert (counsel here for Travis County)), *available at* http://judiciary.house.gov/media/pdfs/printers/109th/24034.pdf.

Given this extensive evidence of clear legislative intent – both textual and historical – we need say little about *Sheffield.* As we explained above, *Sheffield* relates to section 5 preclearance, not section 4(a) bailout. *See City of Rome,* 446 U.S. at 168 (observing that *Sheffield* does "not even discuss the bailout process"). Moreover, the *Sheffield* language on which

the District relies pertains to an issue that the Court itself said it "need not consider," namely how section 5 would apply to a subunit of a separately designated political subdivision. *Sheffield,* 435 U.S. at 128. In any event, even if, as *Sheffield's* dictum suggests, section 14(c)(2)'s definition originally operated only to identify entities eligible for coverage, the amended section 4(a)'s text and legislative history make clear that Congress used that definition in 1982 for an additional purpose: to identify those entities eligible to seek bailout.

The District's remaining arguments are equally unpersuasive. First, it argues that Texas law, which the District says recognizes municipal utility districts as political subdivisions, qualifies it as a political subdivision for purposes of the Voting Rights Act. But because section 14(c)(2) of the Voting Rights Act expressly defines the term "political subdivision," we need not resort to state law. In any event, the case the District cites in support of this argument, *Dougherty County,* makes only a passing reference to state law and in no way relies upon it. *See* 439 U.S. at 43 & n.13. Second, the District insists that limiting bailout to section 14(c)(2) political subdivisions would eviscerate or distort other provisions of the Act, such as by denying cities the right to seek judicial preclearance under section 5 or by exempting cities from section 2's nationwide obligations. This is incorrect. Like section 5, those provisions all refer to "State[s] or political subdivision[s]," and *Sheffield* holds that the Act applies to all political subunits *in* a covered

state or political subdivision – meaning that cities may file for judicial preclearance and must comply with section 2. Finally, the District asserts that bailout is impractical for most counties given their size and the number of political subunits they contain. But nothing in the record supports this claim. In fact, since 1984 every single applicant for bailout has succeeded.

In the end, deciding which entities may seek bailout is a question for Congress, not the courts. In 1982 Congress increased ten-fold the number of entities eligible to apply for bailout – from approximately 91 to almost 900. Def.'s Statement of Uncontested Material Facts ¶¶ 113-14. If the District believes this expansion was too modest, it should address its concerns to Congress.

III.

Having determined that the District is ineligible to seek bailout, we turn to its primary argument: that section 5 "should be stricken as unconstitutional under the Tenth, Fourteenth, and Fifteenth Amendments" because Congress "irrationally and incongruously" chose to continue imposing "disproportionate" burdens and a "badge of shame" on covered jurisdictions on the basis of an "ancient formula" and "conditions that existed thirty or more years ago but have long since been remedied." Am. Compl. ¶¶ 19-22. Defending the statute, the Attorney General argues that Congress, given its findings of continued discrimination and its

judgment that failure to renew the Act's temporary provisions would undermine significant gains in minority participation, properly extended section 5 in "a valid exercise of its authority under the Fourteenth and Fifteenth Amendments." Def.'s Mem. at 9. The intervenors likewise contend that "[s]ection 5 is valid enforcement legislation under the Fourteenth and Fifteenth Amendments and is consistent with principles of federalism." Reply Mem. in Supp. of Def.-Intervenors' Mots. for Summ. J. at 8.

Before addressing the District's constitutional claim, we must determine whether its challenge is facial, as applied, or both. In its original complaint, the District argued that section 5 should "be struck down as unconstitutional, either on its face, or as applied." Compl. ¶ 23. In its amended complaint, however, the District reframed its case exclusively as an "as applied" challenge, leaving the parties and this court puzzled about the District's intentions. Am. Compl. ¶ 23. Nowhere has the District explained – not in its amended complaint, not in its briefs, and not at oral argument – the nature of its as-applied challenge or how that claim differs from the facial challenge pleaded in its original complaint. In any event, as the Attorney General and intervenors point out, the nature of the District's challenge, however labeled, is facial. Like the plaintiffs in *Katzenbach* and *City of Rome,* the District alleges that section 5 exceeds Congress's enumerated powers. Although the District uses the as-applied label in its amended

complaint, the arguments offered in its briefs – which focus almost exclusively on the legislative record and the statutory design – indicate that it still regards its challenge as facial. Accordingly, we shall treat the District's challenge as facial. *See infra* Parts IV and V. Out of an abundance of caution, however, we shall also consider the two arguments the District makes that could be construed as reflecting an as-applied challenge. *See infra* Part VI.

In order to resolve the District's facial challenge to section 5, we must first determine the appropriate standard of review. In two lines of cases, the Supreme Court has articulated two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments. One line, relied on by the District, begins with *City of Boerne v. Flores,* 521 U.S. 507, in which the Court established a congruence and proportionality test for certain legislation enacted pursuant to section 5 of the Fourteenth Amendment. According to the District, in extending section 5 of the Act, Congress failed to clear the "high evidentiary hurdle" of showing that "a 1965 remedy was congruent and proportional to the facts on the ground in 2006." Pl.'s Mem. at 43. Disagreeing, the Attorney General, supported by the Diaz intervenors, argues that given Congress's amply supported findings that section 5 "has been effective at preventing and remedying some voting discrimination" and that "covered jurisdictions continue to discriminate in voting against minority citizens," the provision "remains a congruent and proportional means of enforcing the

Constitution's prohibition on race and national origin discrimination in voting." Def.'s Mem. at 8-9; *see also* Mem. in Supp. of Mot. for Summ. J. of Def.-Intervenors Lisa Diaz et al. at 8-10 ("Diaz Mem."). Although NAACP intervenors agree with the Attorney General that Congress has satisfied the congruence and proportionality standard, they also invoke an earlier and less demanding test, namely the one articulated in *South Carolina v. Katzenbach,* 383 U.S. 301. Mem. of P. & A. in Supp. of Mot. for Summ. J. of Def.-Intervenors Texas NAACP et al. at 27, 29 ("NAACP Mem."). There, the Supreme Court held that when acting pursuant to Section 2 of the Fifteenth Amendment, "Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach,* 383 U.S. at 324 (emphasis added). Applying that standard, the Court sustained the constitutionality of the Voting Rights Act both as originally enacted, *id.* at 337, and as extended in 1975 under both the Fourteenth and Fifteenth Amendments, *City of Rome,* 446 U.S. at 183. According to NAACP intervenors, an "unbroken line of authority refutes any possible contention" that the holdings in *Katzenbach* and *City of Rome* have "lost their force . . . because *Boerne* requires a different analysis." NAACP Mem. at 35. Further developing this theory, the Brennan Center for Justice argues that "while the Supreme Court has found some statutes were not an appropriate means of enforcing the *Fourteenth Amendment,* the Court has been far more deferential when Congress's *Fifteenth Amendment* powers are at stake." Mem. of Law of the Brennan Center for

Justice at NYU School of Law, Amicus Curiae, in Supp. of Def.'s and Def.-Intervenors' Mot. for Summ. J. at 2.

In the following pages we summarize these two lines of cases in some detail: the *Katzenbach* rationality standard in Part IIIA and the more rigorous *City of Boerne* test in Part IIIB. Informed by this review, we conclude in Part IIIC that notwithstanding the *City of Boerne* cases, *Katzenbach's* rationality standard remains fully applicable to constitutional challenges to legislation aimed at preventing racial discrimination in voting.

A.

In *South Carolina v. Katzenbach,* the Supreme Court began by explaining the Fifteenth Amendment's impact on the relationship between Congress and the states: by adding section 2's enforcement clause, "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. . . . Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *Katzenbach,* 383 U.S. at 326. As framed by the Court, the "basic question" was whether Congress had "exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States." *Id.* at 324. To answer this question, the Court employed the test set forth in *McCulloch v. Maryland* for statutes enacted pursuant

to the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 326 (quoting *McCulloch v. Maryland,* 17 U.S. 316, 421 (1819)). Put simply, "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 324.

Applying this deferential standard, the Court declared the Act a "legitimate response" to "nearly a century of systematic resistance to the Fifteenth Amendment." *Id.* at 328. Emphasizing the "great care" with which Congress examined racial discrimination in voting, the Court explained that two points "emerge[d] vividly from the voluminous legislative history":

> First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

Id. at 308-09. Restricting section 5 and the other temporary provisions to certain states was "permissible,"

the Court concluded, because having compiled "reliable evidence of actual voting discrimination" in covered jurisdictions, Congress had only to show that its coverage formula was "relevant to the problem." *Id.* at 329-30. The Court found the formula "rational in both practice and theory." *Id.* at 330. The Court also concluded that section 5 preclearance represented a "permissibly decisive" response to the risk that covered jurisdictions "might try" to devise new voting rules to evade the Act's remedies, as certain states had previously done "in the face of adverse court decrees." *Id.* at 335. "Exceptional conditions," the Court declared, "can justify legislative measures not otherwise appropriate." *Id.* at 334.

Just three months later, in *Katzenbach v. Morgan,* 384 U.S. 641 (1966), the Court extended *Katzenbach's* rationality test to provisions of the Voting Rights Act passed pursuant to section 5 of the Fourteenth Amendment. Like section 2 of the Fifteenth Amendment, section 5 of the Fourteenth Amendment gives Congress "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. At issue in *Morgan* was section 4(e), which provides (in effect) that no person who successfully completes sixth grade in an accredited Spanish-language school in Puerto Rico "shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret . . . English." 42 U.S.C. § 1973b(e). New York voters challenged section 4(e), arguing that it exceeded Congress's Fourteenth Amendment authority. Holding

that *McCulloch's* rationality standard provides "the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment," *Morgan,* 384 U.S. at 651 (quoting U.S. CONST. amend. XIV, § 5), the Court concluded that Congress had reasonably determined that section 4(e) would promote the nondiscriminatory provision of public services by enhancing the Puerto Rican community's "political power," *id.* at 652-53. The Court also found that Congress could reasonably have enacted section 4(e) to eliminate "an invidious discrimination in establishing voter qualifications." *Id.* at 653-54.

In subsequent years, the Supreme Court repeatedly applied the rationality standard in cases challenging the constitutionality of Voting Rights Act reauthorizations. For example, as part of the 1970 reauthorization, Congress renewed section 4(a)'s ban on literacy tests and extended it to the entire nation. 1970 Amendments § 201, 84 Stat. at 315 (codified as amended at 42 U.S.C. § 1973aa). In *Oregon v. Mitchell,* 400 U.S. 112 (1970), the Court, though splintering on other issues, applied *Katzenbach* and *Morgan* and unanimously sustained the nationwide ban. *Id.* at 118 (opinion of Black, J.) (announcing judgment of the Court); *id.* at 217 (opinion of Harlan, J.) ("[T]he choice which Congress made was within the range of the reasonable."); *id.* at 231 (opinion of Brennan, J.) ("[C]ongressional power to enact the challenged Amendments is found in the enforcement clauses of the Fourteenth and Fifteenth Amendments, and . . . we may easily perceive a rational

basis for the congressional judgments underlying each of them."). Eight justices believed the Fifteenth Amendment gave Congress ample authority to extend the ban; one believed the Fourteenth Amendment did so. *See City of Rome,* 446 U.S. at 176-77 & n.13 (discussing *Mitchell*). None required Congress to make a terribly strong evidentiary showing. Indeed, Justice Harlan wrote that "[d]espite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious." *Mitchell,* 400 U.S. at 216 (opinion of Harlan, J.). In another case involving the 1970 Amendments, *Georgia v. United States,* 411 U.S. 526 (1973), Georgia challenged the constitutionality of section 5's extension, but the Court summarily rejected the claim, reiterating that "for the reasons stated at length in [*Katzenbach*] . . . the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment." *Id.* at 535.

In 1975, this time acting pursuant to both the Fourteenth and Fifteenth Amendments, Congress again extended section 5, adding provisions to protect the voting rights of language minorities – defined as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 1975 Amendments § 207, 89 Stat. at 402 (codified at 42 U.S.C. § 1973*l*(c)(3)); *see also* 28 C.F.R. § 55.1 (adopting same definition); *supra* pp. 7-8. Challenging the

constitutionality of the 1975 extension and foreshadowing the issue we face here, Rome, Georgia, argued that section 5's preclearance provisions "had outlived their usefulness" and no longer represented appropriate enforcement legislation. *City of Rome,* 446 U.S. at 180. Rejecting this argument, the Supreme Court reaffirmed *Katzenbach's* holding that Congress's authority under section 2 of the Fifteenth Amendment is "no less broad than its authority under the Necessary and Proper Clause." *Id.* at 175. According to the Court, then, the question before it was whether "Congress could rationally have concluded" that extending section 5 was necessary. *Id.* at 177.

Applying this permissive standard, the Court reviewed three types of evidence compiled by Congress: (1) racial disparities in registration and turnout rates; (2) the number of black elected officials; and (3) the number and types of voting changes submitted for preclearance, along with the number and nature of objections interposed by the Attorney General. *Id.* at 180-81. The Court found that Congress had given "careful consideration" to this evidence – which showed that progress since 1965, "though 'undeniable,' had been 'modest and spotty'" – and "decline[d] this invitation to overrule Congress' judgment that the 1975 extension was warranted." *Id.* (quoting H.R. REP. NO. 94-196, at 7-11 (1975); S. REP. NO. 94-295, at 11-19 (1975)). As the Court explained, Congress thought reauthorization "necessary to preserve the 'limited and fragile' achievements of the Act" and to "counter the perpetuation of 95 years

of pervasive voting discrimination." *Id.* at 182 (quoting H.R. REP. NO. 94-196, at 10-11 (1975)). According to the Court, this "considered determination" was "both unsurprising and unassailable," making section 5's extension "plainly a constitutional method of enforcing the Fifteenth Amendment." *Id.*

The final case in this series, *Lopez v. Monterey County,* 525 U.S. 266, came just nine years ago. There, the Court held that Monterey County, a separately designated political subdivision in California, had to preclear voting changes required by state law "notwithstanding the fact that the State is not itself a covered jurisdiction." *Id.* at 282. Citing both *Katzenbach* and *City of Rome,* the Court observed that it had "specifically upheld the constitutionality of § 5 of the Act against a challenge that this provision usurps powers reserved to the States." *Id.* at 283. Even the dissent recognized that both *Katzenbach* and *City of Rome* had "compared Congress' Fifteenth Amendment enforcement power to its broad authority under the Necessary and Proper Clause." *Id.* at 294 (Thomas, J., dissenting). Critically, neither the majority nor the dissent questioned that standard even though *Lopez* came two years after *City of Boerne,* the case that announced the congruence and proportionality test, to which we now turn.

B.

The Fourteenth Amendment cases upon which the District relies begin with *City of Boerne,* which

involved a constitutional challenge to the Religious Freedom Restoration Act (RFRA). *City of Boerne,* 521 U.S. at 515-16. Purporting to enforce the Constitution's free exercise guarantee, Congress relied on section 5 of the Fourteenth Amendment to apply RFRA to the states. Though acknowledging that section 5 represents a broad grant of legislative power to remedy and deter constitutional violations, even if the prohibited conduct itself is constitutional or the prohibition intrudes on state sovereignty, the Court stressed that this power is "'not unlimited.'" *Id.* at 518 (quoting *Mitchell,* 400 U.S. at 128 (opinion of Black, J.)). In particular, the Court held that Congress's remedial power authorizes it neither to "decree the substance of the Fourteenth Amendment's restrictions" nor to "make a substantive change in the governing law." *Id.* at 519. While observing that Congress deserves "wide latitude" in drawing the line between remedial and substantive legislation, the Court demanded "a *congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520 (emphasis added).

The Court held that RFRA failed this test for several reasons. To begin with, the legislative history documented not a single state law involving deliberate religious persecution in the previous forty years; the congressional hearings instead focused on laws imposing incidental burdens on the free exercise of religion. *Id.* at 530. The Court contrasted this record, which "lack[ed] examples of modern instances of

generally applicable laws passed because of religious bigotry," with the "record which confronted Congress and the Judiciary in the voting rights cases." *Id.* Moreover, RFRA's "[s]weeping coverage" and lack of either a termination date or termination mechanism led the Court to view it as far "out of proportion to a supposed remedial or preventive object." *Id.* at 532. Finally, by imposing litigation burdens and regulatory constraints on states, RFRA exacted "substantial costs" that "far exceed[ed] any pattern or practice of unconstitutional conduct." *Id.* at 534. For all of these reasons, the Court held that Congress had exceeded its Fourteenth Amendment authority by applying RFRA to the states. In doing so – and central to the issue before us – the Court contrasted RFRA with section 5 of the Voting Rights Act, observing that the latter included an expiration date, affected a discrete class of state laws, applied only to regions where discrimination was severe, and allowed covered jurisdictions to bail out. *Id.* at 532-33.

In a series of later cases, the Court refined *City of Boerne's* congruence and proportionality test, holding that those parts of three statutes abrogating state sovereign immunity exceeded Congress's Fourteenth Amendment authority. In each case the Court left intact statutory provisions, enacted pursuant to the Commerce Clause, that regulated private conduct. In the first case, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,* 527 U.S. 627 (1998), the Court invalidated provisions of the Patent and Plant Variety Protection Remedy Clarification Act

that made states liable in federal courts for patent infringement. *Id.* at 647. In *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000), the Court struck down provisions of the Age Discrimination in Employment Act that authorized suits for money damages against state employers. *Id.* at 91. And in *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001), the Court invalidated provisions of Title I of the Americans with Disabilities Act (ADA) that subjected state employers to money damages for violating the Act. *Id.* at 374. As in *City of Boerne,* the Court contrasted the thin legislative records of unconstitutional state action in *Florida Prepaid* and *Garrett* with the "undisputed record of racial discrimination confronting Congress in the voting rights cases." *Fla. Prepaid,* 527 U.S. at 640; *see also Garrett,* 531 U.S. at 373 ("In t[he Voting Rights] Act, Congress documented a marked pattern of unconstitutional action by the States."). Also, as in *City of Boerne,* the Court contrasted the broad accommodation duty at issue in *Garrett* with the Voting Rights Act's "detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified." *Garrett,* 531 U.S. at 373.

Following these cases, two statutes abrogating state sovereign immunity pursuant to the Fourteenth Amendment survived constitutional challenges under the *City of Boerne* test. In *Nevada Department of*

Human Resources v. Hibbs, 538 U.S. 721 (2003), the Court rejected a challenge to Family and Medical Leave Act (FMLA) provisions allowing recovery of money damages from states. *Id.* at 740. One year later, in *Tennessee v. Lane,* 541 U.S. 509 (2004), the Court rejected a constitutional challenge to ADA Title II, which generally prohibits states from excluding disabled individuals from public services, programs, and entities, including state courthouses – the focus of plaintiffs' claims. *Id.* at 533-34. In *Hibbs* the Court emphasized that as with the Voting Rights Act, Congress enacted the FMLA only after being "confronted [with] a 'difficult and intractable proble[m]' where previous legislative attempts had failed." *Hibbs,* 538 U.S. at 737 (citations omitted) (second alteration in original); *see also Lane,* 541 U.S. at 531 ("[Congress] faced . . . considerable evidence of the shortcomings of previous legislative responses."). Distinguishing *Garrett* and *Kimel,* the Court explained in both *Hibbs* and *Lane* that Congress sought to enforce a right or to protect a class that receives heightened judicial scrutiny: suspect gender classifications (the FMLA) and the fundamental right of access to courts (ADA Title II). *Hibbs,* 538 U.S. at 735; *Lane,* 541 U.S. 529. By contrast, as the Court had previously observed, disparate state treatment on the basis of age (*Kimel*) and disability (*Garrett*) receive only rational basis review. *Kimel,* 528 U.S. at 83; *Garrett,* 531 U.S. at 366-68.

Taken together, these four cases – *Kimel, Garrett, Hibbs*, and *Lane* – add a preliminary but critical step

to the *City of Boerne* test: identification of the right or protected class at issue. That is, before assessing the adequacy of the record of unconstitutional state conduct and determining whether Congress's remedial scheme is congruent and proportional to the constitutional harm, courts must decide whether a challenged statute implicates a fundamental right or protected class. As the Court explained in *Hibbs,* if the right or class at issue receives heightened scrutiny, "it [will be] easier for Congress to show a pattern of state constitutional violations." *Hibbs,* 538 U.S. at 736. For example, "[b]ecause racial classifications are presumptively invalid, most of the States' acts of race discrimination" that Congress documented in passing the Voting Rights Act of 1965 "violated the Fourteenth Amendment." *Id.*

C.

Now that we have summarized *Katzenbach's* rationality standard and *City of Boerne's* congruence and proportionality test, the time has come to choose between them. For two independent reasons, we believe that *Katzenbach's* rationality standard governs this case.

The first reason is *City of Rome.* There, the Supreme Court addressed a facial challenge to the 1975 extension of section 5, which Congress had enacted pursuant to both the Fourteenth and Fifteenth Amendments. To resolve that challenge, the Court applied *Katzenbach's* rationality test, finding

the extension a reasonable response to the problem of continued racial discrimination in voting. Here we confront precisely the same issue: a facial challenge to an extension of section 5 based on both the Fourteenth and Fifteenth Amendments.

To be sure, at the time of *City of Rome* there was no indication that the Fourteenth and Fifteenth Amendment standards might differ. *See Morgan,* 384 U.S. at 650-51 (applying same rationality standard to both Fourteenth and Fifteenth Amendments); *see also City of Rome,* 446 U.S. at 180-82 (upholding section 5 with reference only to the Fifteenth Amendment); *id.* at 208 n.1 (Rehnquist, J., dissenting) ("[Because] the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive . . . , it is not necessary to differentiate between the Fourteenth and Fifteenth Amendment powers for the purposes of this opinion.") (citations omitted). Not until *City of Boerne* did the Supreme Court establish the more restrictive congruence and proportionality test for certain statutes enacted pursuant to the Fourteenth Amendment. In our view, however, the *City of Boerne* standard does not apply to the issue before us. To begin with, although the *City of Boerne* cases repeatedly describe the Voting Rights Act as congruent and proportional, they never state that *Katzenbach's* and *City of Rome's* more deferential standard no longer governs constitutional challenges to statutes aimed at racial discrimination in voting. In fact, none of those cases even involved a statute dealing with race or voting rights.

What's more, in *Lopez,* decided two years after *City of Boerne,* the Court cited both *Katzenbach* and *City of Rome* with approval while rebuffing a constitutional challenge to section 5's "federalism costs." *Lopez,* 525 U.S. at 282-83 (internal quotation marks omitted). True, the same passage quotes *City of Boerne,* but only for the general proposition that Congress possesses broad enforcement powers. *Id.*

Nor does anything in *City of Boerne* cast doubt on *Morgan,* in which the Court applied *Katzenbach's* rationality test to a provision of the Voting Rights Act that Congress enacted pursuant to the Fourteenth Amendment and crafted to protect the voting rights of a specific language minority. *See supra* pp. 28-29. The *City of Boerne* Court discussed *Morgan* at some length, explaining that it had upheld section 4(e) as a "*reasonable* attempt to combat" unconstitutional discrimination by the state of New York. *City of Boerne,* 521 U.S. at 527-28 (emphasis added). Indeed, citing *Morgan* and viewing section 4(e) as a measure aimed at "racial discrimination," Justice Scalia announced in *Lane,* the most recent of the *City of Boerne* cases, that "I shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 [of the Fourteenth Amendment] to prevent or remedy racial discrimination by the States." *Lane,* 541 U.S. at 561, 564 (Scalia, J., dissenting).

Moreover, the basic concerns animating the *City of Boerne* cases do not apply to legislation designed to prevent racial discrimination in voting. In *City of*

Boerne itself, the Court worried that Congress, by relying on its authority to enforce the Fourteenth Amendment's broad guarantees, could "decree the substance" of that amendment's restrictions on the states, thereby transforming the Constitution from a "superior paramount law" into something "on a level with ordinary legislative acts." *City of Boerne,* 521 U.S. at 519, 529 (citations and internal quotation marks omitted). The risk that Congress might redefine substantive rights carries special force in the Fourteenth Amendment context because that amendment functions as the vehicle through which various rights, including the Constitution's broadly drafted equal protection and due process guarantees, apply to the states. *See, e.g., Romer v. Evans,* 517 U.S. 620, 628-29 (1996) (observing that "heightened equal protection scrutiny" applies to classifications involving sex, illegitimacy, race, and ancestry); *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997) (observing that "in addition to the specific freedoms protected by the Bill of Rights," the Due Process Clause protects "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion" (citations omitted)); *see also* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 936 (3d ed. 2000) ("Because the [Fourteenth A]mendment's phrases are so open to a range of interpretations, they invite not only remedial congressional legislation, but congressional definition of the very rights themselves."). No such risk exists here because the Voting Rights Act focuses exclusively on

racial discrimination – the precise evil addressed by the Civil War Amendments – in the narrow context of voting, as the Fifteenth Amendment expressly authorizes. *See, e.g., Mitchell,* 400 U.S. at 127 (opinion of Black, J.) (noting, in upholding ban on use of literacy tests or other devices to discriminate against voters on account of race, that "the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race").

In the cases following *City of Boerne,* the Court also worried that Congress had impermissibly included states within the ambit of statutes targeting non-state actors. Those cases all involve broadly applicable statutes enacted under both the Fourteenth Amendment and the Commerce Clause. In that context, the Court refused to "infer from Congress' general conclusions regarding societal discrimination . . . that the States had likewise participated in such action." *Garrett,* 531 U.S. at 371. Through the congruence and proportionality test, the post-*Boerne* cases thus require Congress, when relying on the Fourteenth Amendment to abrogate state sovereign immunity through statutes enacted primarily under the Commerce Clause, to establish an adequate record of constitutional violations by states rather than compiling evidence of discrimination by private actors. Congress satisfied this requirement in 2006 when it extended section 5 on the basis of a legislative record that focused almost exclusively on state actors. Equally significant, the prohibitions contained in the Voting Rights Act apply only to

states and their political subunits. *Cf. United States v. Morrison,* 529 U.S. 598, 625-27 (2000) (holding that Congress exceeded its authority to enforce the Fourteenth Amendment by enabling victims of gender-motivated violence to file suits against private perpetrators, not "any State or state actor").

There is a second, independent reason we feel bound to apply *Katzenbach's* and *City of Rome's* rationality standard. Even if the *City of Boerne* cases changed the test for *all* statutes enacted pursuant to the Fourteenth Amendment, including provisions aimed at preventing racial discrimination in voting, those cases leave the Fifteenth Amendment standard untouched. The *City of Boerne* cases all arose under the Fourteenth Amendment, not the Fifteenth, and although the Court described Congress's powers to enforce the two amendments as "parallel," *City of Boerne,* 521 U.S. at 518, and observed in a footnote that their enforcement clauses are "virtually identical," *Garrett,* 531 U.S. at 373 n.8, such dicta hardly suffice to overrule *Katzenbach* and *City of Rome.* Indeed, the Supreme Court has never applied the congruence and proportionality test to legislation enforcing the Fifteenth Amendment. *See Eldred v. Ashcroft,* 537 U.S. 186, 218 (2003) ("[P]etitioners ask us to apply the 'congruence and proportionality' standard described in cases evaluating exercises of Congress' power under § 5 of the Fourteenth Amendment. But we have never applied that standard outside the § 5 context." (citation omitted)).

This matters a great deal because, at its core, this is a Fifteenth Amendment case: while Congress cited the Fourteenth Amendment when it adopted the Act's protections for language minorities in 1975 and extended them in 2006, it could have relied solely on its Fifteenth Amendment authority. Although the Supreme Court has yet to speak precisely to whether the Fifteenth Amendment protects language minorities, its decisions strongly suggest that such minorities, at least as defined in the Act, qualify as racial groups. For example, in a recent case involving native Hawaiian voters, the Supreme Court held that "[a]ncestry can be a proxy for race" and that the Fifteenth Amendment protects "all persons, not just members of a particular race." *Rice v. Cayetano,* 528 U.S. 495, 512, 514 (2000). Further, in a case involving an Arab-American plaintiff, the Court held that a statutory ban on racial discrimination protects "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry." *Saint Francis Coll. v. Al-Khazraji,* 481 U.S. 604, 613 (1987). Finally, in *Mitchell,* where the Supreme Court sustained the constitutionality of the nationwide literacy test ban, two of the opinions that relied on the Fifteenth Amendment treated both Native Americans and individuals with "Spanish surname[s]" as racial minorities. *Mitchell,* 400 U.S. at 132 (opinion of Black, J.); *id.* at 235 (opinion of Brennan, J.). Given that section 5 protects specific language minorities, all identified by ancestry or heritage, Congress could have based the provision's expansion solely upon the Fifteenth Amendment.

This conclusion finds support in Supreme Court cases treating Latinos as a racial group protected by the Fourteenth Amendment's Equal Protection Clause. As early as 1954, in a case challenging the exclusion of Mexican-Americans from jury service, the Court rejected Texas's argument that "there are only two classes – white and Negro – within the contemplation of the Fourteenth Amendment." *Hernandez v. Texas,* 347 U.S. 475, 477 (1954). The Court instead found that persons of Mexican descent represented an identifiable class protected against discrimination because "residents of [Jackson County] distinguished between 'white' and 'Mexican'" in segregating their local schools, courthouse bathrooms, and "at least one restaurant." *Id.* at 479. Similarly, in a case involving a Texas legislative redistricting, the Court affirmed a district court order finding that a multi-member district was "invidiously discriminatory" against Mexican-Americans, which the Court regarded as a "cognizable racial or ethnic group[ ]." *White v. Regester,* 412 U.S. 755, 756, 767-70 (1973); *see also Keyes v. Sch. Dist. No. 1,* 413 U.S. 189, 195, 198 (1973) (finding that in Denver – a "tri-ethnic" community – blacks and Hispanics "suffer identical discrimination in treatment when compared with the treatment afforded Anglo students"). Finally, in a more recent Texas redistricting case, the Court treated the state's Latino population as a distinct minority group characterized by "*racially* polarized voting." *League of United Latin Am. Citizens v. Perry,* 126 S. Ct. 2594, 2615 (2006) ("*LULAC*") (emphasis added); *see also id.* at 2663 (Roberts, C.J., dissenting)

("It is a sordid business, this divvying us up by race."); *id.* at 2667 (Scalia, J., dissenting) ("[W]hen a legislature intentionally creates a majority-minority district, race is necessarily its predominant motivation."). Because the Fifteenth Amendment, like the Fourteenth, prohibits discrimination on the basis of race, these cases, which treat persons of Spanish heritage as a distinct racial group, support the conclusion that the Fifteenth Amendment gave Congress all the authority it needed to extend section 5 to protect language minorities.

Indeed, the Justice Department advised Congress that it had no need to invoke the Fourteenth Amendment in order to expand section 5 protection to language minorities. "[I]t is clear," the Justice Department explained in a 1975 memorandum to the Senate Judiciary Committee, "that [the Fifteenth Amendment's] protection is not limited to blacks." *Extension of the Voting Rights Act of 1965, Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary,* 94th Cong. 698 (Apr. 29, 1975) (exhibit to testimony of J. Stanley Pottinger). The Department pointed out that when drafting the Fifteenth Amendment, the Senate "twice rejected . . . a provision which stated that: 'Citizens . . . of African descent shall have the same right to vote and hold office . . . as other citizens,'" and that some opposition to this proposal "was based on the belief that the amendment's protection should not be limited to one race." *Id.* (second and third omissions in original). Moreover, California and Oregon refused to ratify the

amendment in part because of "fear that it would lead to enfranchisement of Chinese persons." *Id.* Finally, given that "there was general agreement in Congress in 1869 that the 15th Amendment would protect the voting rights of Indians," *id.* at 699, and given that the "vast majority of the population of Mexico is at least in part of Indian ancestry," the Justice Department concluded by "stat[ing] firmly . . . that Congress has the power under [section] 2 of the 15th Amendment to enact legislation protecting the voting rights of [Mexican-Americans] or Puerto Ricans," *id.* at 700. The Department explained that this view was consistent with its implementation of the Voting Rights Act: in reviewing section 5 submissions, the Attorney General had consistently "treat[ed] Indians, Puerto Ricans and Mexican-Americans as racial groups." *Id.* at 698.

Having heard the Justice Department's advice, Congress cited the Fourteenth Amendment only out of an abundance of caution. The Senate Report explains:

> The Department of Justice and the United States Commission on Civil Rights have both expressed the position that all persons defined in this title as "language minorities" are members of a "race or color" group protected under the Fifteenth Amendment. However, the enactment of the expansion amendments under the authority of the Fourteenth as well as the Fifteenth Amendment, would *doubly insure* the constitutional basis for the Act.

S. REP. NO. 94-295, at 47-48 (1975) (emphasis added). Thus, although Congress cited the Fourteenth Amendment when it extended section 5 in 1975, 1982, and 2006, it had no need to do so, as it could have relied solely on the Fifteenth Amendment.

To sum up, given relevant Supreme Court precedent, we must treat this case either as a sequel to *City of Rome* or as a straightforward Fifteenth Amendment case. Either way we must apply *Katzenbach's* and *City of Rome's* rationality test. With its greater degree of deference to Congress, this test is proper here because, put simply, this case implicates Congress's express constitutional authority to remedy *racial* discrimination in *voting*. None of the *City of Boerne* cases involved two such essential rights, much less any rights so close to the core objectives of the Civil War Amendments. We thus have no basis for reading those cases as overturning the Court's long-standing rule, set forth in *Katzenbach* and followed in *Morgan, Mitchell, Georgia*, and *City of Rome,* that "against the reserved powers of the states, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach,* 383 U.S. at 324.

Indeed, as a district court bound by Supreme Court precedent, we would follow *Katzenbach* and *City of Rome* even if we thought the *City of Boerne* cases cast some doubt on those cases. As the Supreme Court has warned, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions,

[district courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Here, the decisions that "directly control[]" are *Katzenbach* and *City of Rome*, for only they resolve constitutional challenges to section 5 of the Voting Rights Act.

IV.

Before applying *Katzenbach's* rationality standard to the record before us, we can easily dispose of three of the District's broader attacks on the Act's constitutionality, for each was squarely considered and rejected in *City of Rome*. First, the District challenges section 5 as an extraordinarily intrusive federal mandate that "interfere[s] with and reorder[s] state government," violating rights reserved to the states under the Tenth Amendment. Pl.'s Mem. at 26. In *City of Rome*, however, the Court made clear that the Fifteenth Amendment was "specifically designed as an expansion of federal power and an intrusion on state sovereignty." 446 U.S. at 179. Second, the District argues that because the Fifteenth Amendment prohibits only "measures implemented with the intent and effect of denying racial minorities access to the ballot," section 5 "cuts too broad a swath" given that it covers a "vast amount of clearly constitutional government activity." Pl.'s Mem. at 45, 56. Rejecting the identical argument in *City of Rome*, the Court held that "the Act's ban on electoral changes that are

discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting." *City of Rome,* 446 U.S. at 177; *cf. Lopez,* 525 U.S. at 282 ("[Section] 5's preclearance requirement applies to a covered county's nondiscretionary efforts to implement a voting change required by state law, notwithstanding the fact that the State is not itself a covered jurisdiction."). Finally, pointing to congressional findings of "significant progress" under the Act, the District insists that "Congress could not permissibly [extend section 5] with no showing that [the] extraordinary conditions [of 1965] persist in modern times." Pl.'s Mem. at 46-47. Yet in *City of Rome,* while acknowledging minority political progress since 1965, the Court still accepted Congress's judgment that extension of section 5's preclearance requirement was "necessary . . . to promote *further amelioration* of voting discrimination." *City of Rome,* 446 U.S. at 182 (emphasis added).

With the District's resurrected arguments out of the way, we turn to the primary task before us. Under *Katzenbach* and *City of Rome,* we ask whether Congress could rationally have concluded that unless it extended section 5, "racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Amendments § 2(b)(9), 120 Stat. at 578. Given that the Court in *City of Rome*

found the 1975 legislative record sufficient to demonstrate that Congress had rationally extended section 5, the more precise questions before us are these: how do the nature and magnitude of the racial discrimination in voting revealed in the 2006 legislative record compare to the conditions documented by Congress in 1975, and is the 2006 record sufficiently comparable to the 1975 record for us to conclude that Congress again acted rationally when it extended section 5 for another twenty-five years?

A.

Keeping *Katzenbach's* deferential standard firmly in mind and using the 1975 legislative record as a guidepost, we begin our review of the 2006 legislative record with Congress's consideration of the three categories of evidence the Court examined in *City of Rome*: racial disparities in registration (as well as turnout), the number of minority elected officials, and objections by the Attorney General. We then examine additional evidence Congress relied upon in 2006: "more information request" letters from the Attorney General, judicial preclearance suits, section 5 enforcement actions, section 2 litigation, appointment of federal election observers, and racially polarized voting. This summary concludes with evidence of section 5's deterrent effect. All citations are to evidence contained in the legislative record. A few studies presented to Congress in draft form later underwent minor revisions before being published, but given that our review is limited to the actual

evidence Congress considered, we refer only to the original versions.

Registration and Turnout

Massive disparities between black and white registration rates in many southern states, together with other evidence of discrimination, prompted the original enactment of the Voting Rights Act in 1965. For example, black registration was 32% in Louisiana, 19% in Alabama, and only 6% in Mississippi – more than 50 percentage points below the rate for white citizens in each of those states. S. REP. NO. 109-295, at 11 (2006); *Katzenbach,* 383 U.S. at 313. In its challenge to the 1975 reauthorization, Rome pointed out that by 1976 black registration rates in four southern states exceeded the national average for blacks and argued that the "emergency with respect to which Congress acted in 1964 ha[d] passed." Brief for the Appellants at 106-07, *City of Rome,* 446 U.S. 156 (No. 78-1840). Although the Supreme Court acknowledged this dramatic progress, it upheld the constitutionality of the 1975 extension because Congress had found that "[s]ignificant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions." *City of Rome,* 446 U.S. at 180. In particular, 16- to 24-point gaps in registration rates persisted in Alabama, Louisiana, and North Carolina. H.R. REP. NO. 94-196, at 7 (1975); S. REP. NO. 94-295, at 13 (1975).

Echoing Rome's arguments, the District claims that increasing black registration and turnout rates, as documented by Congress in 2006, "*negate* the existence of extraordinary circumstances like those existing in 1965." Pl.'s Mem. at 47-48 (discussing findings in S. REP. NO. 109-295, at 8 (2006), and H.R. REP. NO. 109-478, at 12 (2006)). But this is the wrong comparison. As noted above, the *City of Rome* Court acknowledged the dramatic progress the South had made since 1965, yet found the evidence of continued discrimination sufficient to justify the 1975 extension. The correct comparison, then, is between the evidence the Court found sufficient in *City of Rome* and the evidence Congress compiled in 2006. Viewed from that perspective, the racial disparities revealed in the 2006 legislative record differ little from what Congress found in 1975. Alabama, Louisiana, and North Carolina had racial disparities in registration of 16 to 24 points at the time of *City of Rome*; the 2006 House Report identifies comparable gaps in three other states: Virginia, Texas, and Florida. In Virginia the racial disparity between whites and blacks in registration was 11 points; the disparity in turnout was 14 points. H.R. REP. NO. 109-478, at 25 (2006). In Texas the registration gap between whites and Hispanics was 20 points. *Id.* at 29. And in Florida the House committee found even larger gaps between whites and Hispanics: 31 points in registration and 24 points in turnout. *Id.* In other words, despite significant progress – attributable in large part to the Voting Rights Act itself – Congress, having surveyed evidence

from covered jurisdictions, determined that more remained to be done.

In fact, as NAACP intervenors point out, racial disparities in electoral participation were actually greater than even Congress believed. Both the House and Senate Reports rely on a 2004 census table, but each focuses on the wrong row of numbers, i.e., on a row entitled "White alone" rather than the row immediately below entitled "White non-Hispanic alone." This mistake effectively reduced the registration and turnout rates of *non*-Hispanic whites. NAACP Mem. at 60-61 (citing Senate testimony of Nathaniel Persily). Data in the correct row reveal that black registration and turnout rates were higher than those of non-Hispanic whites not in five covered states, as Congress thought, but in only one – Mississippi. *Compare* U.S. Census Bureau, Current Population Survey tbl. 4a (Nov. 2004) ("Census Bureau Survey"), *available at* http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls, *with* S. REP. NO. 109-295, at 11 (2006). The impact of this error in Texas was dramatic: although both the House and Senate committees reported that black registration and turnout rates *exceeded* those for whites by 7 and 5 points respectively, those rates were actually 5 and 8 points *lower* than for non-Hispanic whites alone. *Compare* H.R. REP. NO. 109-478, at 12 (2006), *and* S. REP. NO. 109-295, at 11 (2006), *with* Census Bureau Survey tbl. 4a.

At oral argument counsel for the District pointed to a second error, namely that "with respect to Hispanic

registration rates in Texas, if you equalize for citizenship, that gap [of 20 points between whites and Hispanics] largely disappears." Mots. Hr'g Tr. at 43 (Sept. 17, 2007). True, Congress failed to acknowledge that only 71% of Hispanic adults in Texas were U.S. citizens eligible to register, *see* Census Bureau Survey tbl. 4a. But taking citizenship into account hardly makes the registration gap "largely disappear[]." In fact, a substantial 16-point gap remains, *id.* – a gap comparable to the disparity the *City of Rome* Court called "significant." *City of Rome,* 446 U.S. at 180.

Minority Elected Officials

In 1965, when Congress originally enacted the Voting Rights Act, only seventy-two blacks were serving as elected officials in eleven southern states. S. REP. NO. 94-295, at 14 (1975). Ten years later, when Congress extended section 5 for a second time, 995 black elected officials, including sixty-eight state legislators and one member of Congress, were serving in seven covered states. *Id.* Acknowledging this progress in *City of Rome,* the Court took note of Congress's finding that "'a bleaker side of the picture yet exists,'" observing that black elected officials "held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short" of proportional representation. *City of Rome,* 446 U.S. at 180-81 (quoting H.R. REP. NO. 94-196, at 7 (1975)). In Mississippi, then 37% black, African Americans held less than 1% of state legislative seats. S. REP. NO. 94-295, at 14 (1975).

And in South Carolina, then 31% black, they held less than 8% of legislative seats. *Id.*

Highlighting the South's progress, the District cites Congress's finding that the number of African American elected officials in the six southern states originally covered by the Act "increased by approximately 1000 percent *since 1965*." H.R. REP. NO. 109-478, at 18 (2006) (emphasis added). Again, this is the wrong comparison. Although the House committee found that minorities have made significant gains in winning elected office in covered jurisdictions, *id.*, progress on this front, as the Court recognized in *City of Rome*, was well underway by 1975, 446 U.S. at 180. And like the "bleaker side" Congress emphasized in 1975, the 2006 legislative record reveals that gains by minority candidates remain uneven, both geographically and by level of office. In three of the six originally covered states – Mississippi, Louisiana, and South Carolina – the House committee found that not one African American had ever been elected to statewide office. H.R. REP. NO. 109-478, at 33 (2006). The committee also reported that African Americans accounted for only 21% of state legislators in six southern states where the black population averaged 35% – Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina. *Id.* Finally, the committee found that the number of Latinos and Asian Americans elected to office nationwide "has failed to keep pace with [the] population growth" of those two communities. *Id.*

Attorney General Objections

Recall that section 5 requires covered jurisdictions to submit all proposed voting changes for review to either the Attorney General or a three-judge panel of this court. *See supra* p. 5. During the Act's first five years, from 1965 to 1970, the Attorney General reviewed 578 proposed changes, objecting to only 4%. H.R. REP. NO. 94-196, at 9-10 (1975). Around the time of the 1970 Amendments, the Justice Department adopted regulations for screening submissions, and two Supreme Court rulings "gave broad interpretations to the scope of Section 5." *Id.* at 9 (discussing *Allen v. State Bd. of Elections,* 393 U.S. 544 (1969), and *Perkins v. Matthews,* 400 U.S. 379 (1971)). These two events produced a spike in section 5 submissions, from 255 in 1970 to an annual average of 975 from 1971 to 1974, during which time the rate of Attorney General objections remained steady at 3 to 4%. *Id.*

In its challenge to the 1975 reauthorization, Rome informed the Court that by 1978 the objection rate had fallen sharply to 0.8%. Jurisdictional Statement of Appellants at 42 n.16, *City of Rome,* 446 U.S. 156 (No. 78-1840). Given this, Rome argued that section 5 had become obsolete and that administrative preclearance, "having become a mere 'inventory of voting procedures,' ha[d] paradoxically become a 'dead letter.'" *Id.* (quoting *Georgia,* 411 U.S. at 531, 538). The Supreme Court rejected this argument, emphasizing Congress's "ringing endorsement" of section 5 and quoting at length from the 1975 House Report:

> The recent objections entered by the Attorney General . . . clearly bespeak the continuing need for this preclearance mechanism. As registration and voting of minority citizens increases [sic], other measures may be resorted to which would dilute increasing minority voting strength. . . .
>
> The Committee is convinced that it is largely Section 5 which has contributed to the gains thus far achieved in minority political participation, and it is likewise Sect[i]on 5 which serves to insure that that progress not be destroyed through new procedures and techniques.

City of Rome, 446 U.S. at 181 (quoting H.R. REP. NO. 94-196, at 10-11 (1975)).

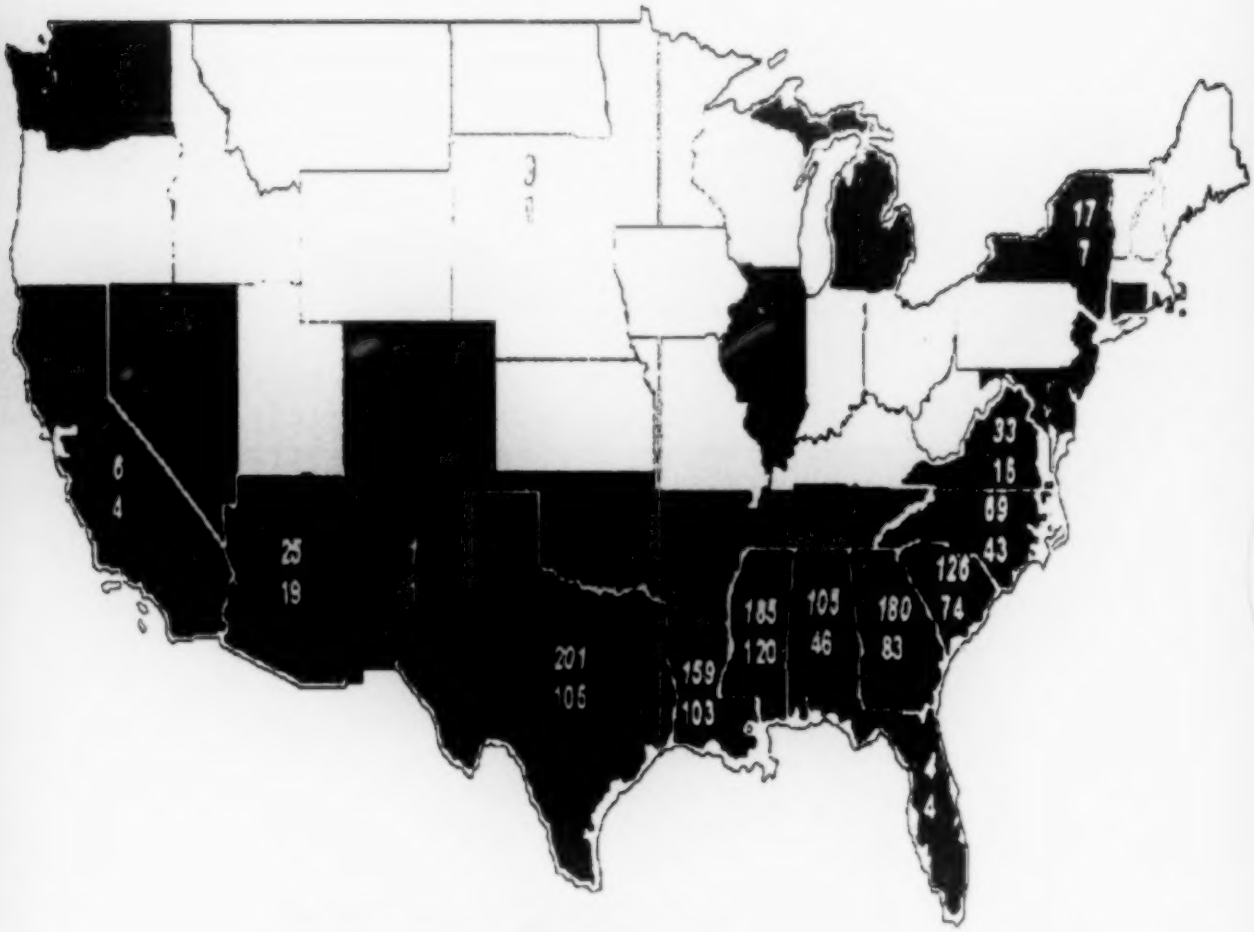
Again echoing Rome's challenge, the District argues that the objection rate has been "negligible in recent years." Pl.'s Mem. of P. & A. in Opp'n to Defs.' Mots. for Summ. J. at 63 ("Pl.'s Opp'n"). According to the District, the rate has become "so vanishingly small" as to refute all claims that section 5 "acts as anything other than a symbolic assertion of federal supremacy intended to perpetuate the fiction that states and localities cannot be trusted to enact fair and nondiscriminatory voting practices and procedures." *Id.* at 64. For support the District cites statistics revealing a steady drop in objection rates over 5-year intervals beginning in 1968: from 4.06% (1968-72) to 1.31% (1973-77) to .44% (1978-82) to .21% (1983-87) and ultimately to .05% (1998-2002). *An*

Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization, Hearing Before the S. Comm. on the Judiciary, 109th Cong. 219 (May 9, 2006) ("*Introduction to Expiring Provisions*") (statement of Richard L. Hasen), *available at* http://www.access.gpo.gov/congress/senate/pdf/109hrg/28213.pdf.

Objection rates have indeed declined, but that hardly means section 5 has outlived its usefulness. For one thing, Congress heard testimony that the Attorney General interposed more objections between August 1982 and 2004 (626) than between 1965 and the 1982 reauthorization (490). 1 *Evidence of Continued Need* 172 (report of Nat'l Comm'n on the Voting Rights Act). Map 5A, on the next page, displays the number of objections in each covered jurisdiction, revealing that nine states received more objections after 1982 than before. *Id.* at 259 (showing that in nine of fourteen covered states receiving objections, the post-1982 total (the lower, bolded number) is greater than half the cumulative 1966-2004 total (the upper, italicized number)). Congress found that "[t]his increased activity shows that attempts to discriminate persist and evolve, such that Section 5 is still needed to protect minority voters in the future." H.R. REP. NO. 109-478, at 21 (2006); *see also id.* at 21-24, 36-40 (discussing section 5 objections). Moreover, as the legislative record reveals, the objection rate has always been low, and the sharpest declines occurred before *City of Rome*. *Introduction to Expiring Provisions* 219 (statement of Richard L. Hasen). Finally, as

the intervenors point out, the number and rate of objections reveal little about the true impact of a proposed change. For example, an objection to a minor procedural change by a small utility district affects far fewer voters than an objection to a statewide redistricting, yet each counts as one objection. And the frequency of objections depends on a variety of factors unrelated to actual levels of discrimination, such as shifting Supreme Court and statutory standards as well as how aggressively different Attorneys General interpret and enforce the law. *See, e.g., Miller v. Johnson,* 515 U.S. 900, 923-27 (1995) (rejecting Attorney General's view that section 5 requires covered jurisdictions to maximize the number of majority-minority districts in ameliorative redistricting plans); *Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 477 (1997) ("*Bossier Parish I*") (rejecting Attorney General's view that violations of section 2 provide an independent basis for section 5 objections); *Reno v. Bossier Parish Sch. Bd.,*

MAP 5A
Objections
(1966 - 2004 and August 5, 1982 - 2004)*



Percent Nonwhite Voting-Age Population (2000)
By Quintile

- 2.9 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 68.2

Section 5 Fully Covered States
Partially Covered States

*Italicized numbers = Objections 1966 - 2004
Boldface numbers = Objections August 5, 1982 - 2004

Two objections were interposed in Alaska after 1982, and none in Hawaii at any time.

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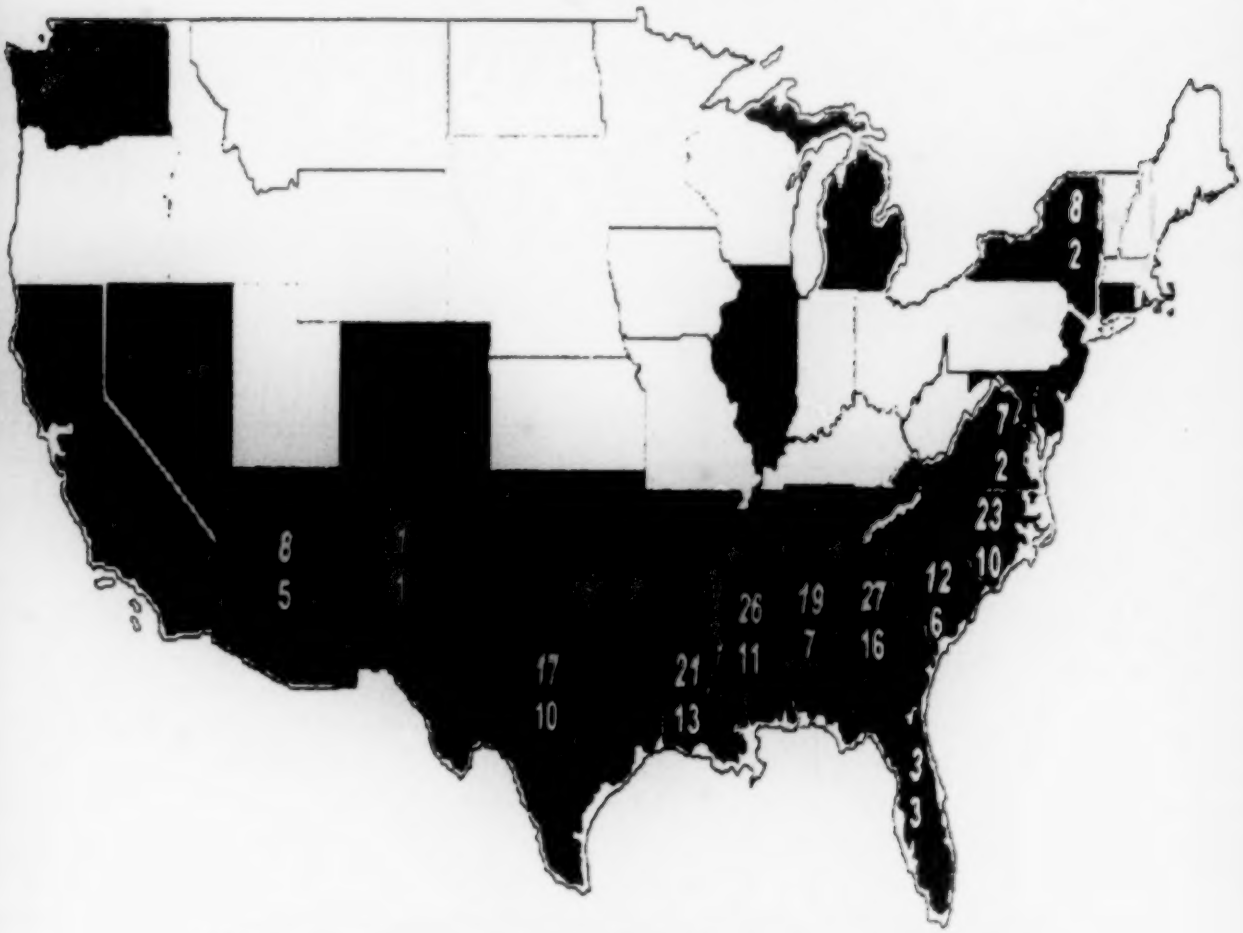
528 U.S. 320, 335-36 (2000) ("*Bossier Parish II*") (rejecting Attorney General's view that section 5 authorizes objections based on a finding of discriminatory but nonretrogressive purpose); 2006 Amendments § 5, 120 Stat. at 580-81 (overruling *Bossier Parish II* by defining "purpose" to include "any discriminatory purpose").

Significantly for our purposes, Congress's evaluation of the evidence extended beyond bare numbers of submission counts and objection rates. Like the Congress that extended the Act in 1975, the 2006 Congress delved into the "*types* of submissions made by covered jurisdictions and the . . . *nature* of objections interposed by the Attorney General." *City of Rome,* 446 U.S. at 181 (emphasis added). As in 1975, the legislative record reveals that the Attorney General interposed objections to a wide variety of electoral changes proposed by governments at all levels. *See* 1 *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 225-1684 (Oct. 25, 2005) ("1 *Section 5 History*") (displaying by state all objection letters since 1982), *available at* http://judiciary.house.gov/media/pdfs/printers/109th/24120_vol.1.pdf; 2 *Section 5 History* 1686-2595 (same). Since 1982, the Attorney General has objected to at least one statewide election change in every fully covered state and in most partially covered states; indeed, Map 5B, on the next page, reveals that six covered states received more such objections after 1982 than before. 1 *Evidence of*

Continued Need 260 (report of Nat'l Comm'n on the Voting Rights Act). In one particularly stark example, Congress heard testimony that not one redistricting plan for the Louisiana House of Representatives had ever been precleared as originally submitted. *To Examine the Impact and*

MAP 5B
Statewide Objections Only
(1966 - 2004 and August 5, 1982 - 2004)*



Percent Nonwhite Voting-Age Population (2000)
By Quintile

- 0.0 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 68.2

Section 5 Fully Covered States
Partially Covered States

*Italicized numbers = Objections 1966 - 2004
Boldface numbers = Objections August 5, 1982 - 2004

Two objections were interposed in Alaska after 1982, and none in Hawaii at any time.

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Effectiveness of the Voting Rights Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 16 (Oct. 18, 2005) ("*Impact and Effectiveness*") (testimony of Marc Morial), *available at* http://judiciary.house.gov/media/pdfs/printers/109th/24033.pdf. Within states, at the local government level, objections were more numerous in areas with higher percentages of minority residents, as Maps 5F and 5G (on the next pages) show for Louisiana and Mississippi. 1 *Evidence of Continued Need* 264-65 (report of Nat'l Comm'n on the Voting Rights Act). Even the smallest political subunits, including several water districts in Texas, received objections. For example, in a 1994 letter concerning the Gonzales County Underground Water Conservation District, the Attorney General objected to a redistricting plan with "grossly malapportioned" districts that were developed through a process in which "the minority community appear[ed] effectively to have been frozen out." 2 *Section 5 History* 2458 (Letter from Deval L. Patrick, Assistant Attorney Gen., DOJ Civil Rights Div., to Mary Anne Wyatt (Oct. 31, 1994)). In 1993 the Edwards Underground Water District drew an objection when, having recently elected its first Hispanic directors, it sought to replace its system of single-member districts with an appointed board. *Id.* at 2424 (Letter from James P. Turner, Acting Assistant Attorney Gen., DOJ Civil Rights Div., to John Hannah, Jr., Tex. Sec'y of State (Nov. 19, 1993)). And in 1991 the Attorney General blocked Lubbock County Water Control and Improvement District No. 1 from reassigning polling

places serving minority voters to "more remote and inaccessible rural communities." *Id.* at 2301 (Letter from John R. Dunne, Assistant Attorney Gen., DOJ Civil Rights Div., to Don Graf, Esq. (Mar. 19, 1991)).

MAP 5F
Objections by Parish: Louisiana
(August 5, 1982 - 2004)

Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

MAP 5G
Objections by County: Mississippi
(August 5, 1982 - 2004)

Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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Equally significant, Congress heard testimony regarding many objection letters in which the Attorney General summarized evidence of possible intentional discrimination and concluded that the jurisdiction had failed to satisfy its burden of demonstrating that the proposed change was not motivated by a discriminatory or retrogressive purpose. *See, e.g., Voting Rights Act: Section 5 – Preclearance Standards, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 7-8, 13-18 (Nov. 1, 2005) ("*Section 5 – Preclearance Standards*") (testimony of Mark A. Posner) (discussing objections based on discriminatory intent in the 1990s), *available at* http://judiciary.house.gov/media/pdfs/printers/109th/24283.pdf; *id.* at 20 (testimony of Brenda Wright) (observing that during the 1980s and 1990s, "over 200 section 5 objections were based solely on racially discriminatory intent"). Objection letters based on intent provide particularly salient evidence of potentially unconstitutional state action. *See Bossier Parish I,* 520 U.S. at 481 ("Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the State or political subdivision acted with a discriminatory purpose."). Using the analytic framework set forth in *Village of Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 265-66 (1977), which the Attorney General employs to evaluate possible intentional discrimination, *see Bossier Parish I,* 520 U.S. at 488-89 (finding the *Arlington Heights* framework relevant to section 5 purpose analysis), one

study in the legislative record found that during the two decades from 1980 to 2000, the Attorney General interposed 421 objections based entirely or partly upon discriminatory intent. *Section 5 – Preclearance Standards* 129-30, 180 tbl. 2. Even as recently as the 1990s, 43% of all objections were based on intent alone, while another 31% were based on a combination of intent and effect. *Id.* at 180 tbl. 2. Relying on this large number of intent-based objections, the House committee found that covered jurisdictions continued to "intentionally develop[ ]" voting changes "to keep minority voters and candidates from succeeding in the political process," including so-called second-generation techniques such as: "enacting discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing . . . single member districts to at-large voting and implementing majority vote requirements." H.R. REP. NO. 109-478, at 36 (2006); *see also id.* at 12; 2006 Amendments §§ 2(b)(1) and (2), 120 Stat. at 577 (discussing first and second generation barriers). This finding mirrors the 1982 legislative record where Congress observed that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot," H.R. REP. NO. 97-227, at 17 (1981) (quoting *Allen,* 393 U.S. at 569), and that "covered jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices to dilute

minority voting strength," S. REP. NO. 97-417, at 10 (1982).

Three Mississippi objection letters are particularly revealing. The first involves the town of Kilmichael, where the white mayor and the all-white Board of Aldermen cancelled local elections in 2001 when an "unprecedented number" of African Americans sought office. H.R. REP. NO. 109-478, at 36-37 (2006). After objecting to the cancellation, the Justice Department discovered that, according to the most recent census, African Americans had become a majority in Kilmichael. The town refused to reschedule the election, but after the Attorney General forced it to do so, Kilmichael elected three African American aldermen and its first African American mayor. *Id.*

The second letter involves Mississippi's recent efforts to revive its dual registration system, "which was initially enacted in 1892 to disenfranchise Black voters." H.R. REP. NO. 109-478, at 39 (2006). Requiring separate registration for state and federal elections, the system was struck down in 1987 by a federal court. *Operation Push v. Allain,* 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom., Operation Push v. Mabus,* 932 F.2d 400 (5th Cir. 1991). In 1995, without seeking preclearance, Mississippi again established separate registration systems, ostensibly to comply with the National Voter Registration Act, which required states to provide voter registration through public assistance agencies. Mississippi, however, allowed registration at its Department of Human Services only for federal elections and administered the

new system "in such a way that discriminatory effects on black voters were not just foreseeable but almost certain to follow." *Section 5 – Preclearance Standards* 83 (Letter from Isabelle Katz Pinzler, Assistant Attorney Gen., DOJ Civil Rights Div., to Sandra M. Shelson, Miss. Special Attorney Gen. (Sept. 22, 1997)). According to the Attorney General, the reasons state officials gave for rejecting alternative proposals were "insubstantial, and in some cases . . . couched in racially charged terms indicating antipathy towards 'welfare voters.'" *Id.* After the Supreme Court directed Mississippi to submit the changes for review, *Young v. Fordice,* 520 U.S. 273 (1997), the Attorney General denied preclearance, finding that the state had failed to show its registration procedures were "not tainted by improper racial considerations." *Section 5 – Preclearance Standards* 83; *see also id.* at 70-78 (statement of Brenda Wright); 2 *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1725-26 (Mar. 8, 2006) ("2 *Evidence of Continued Need*") (report of Robert McDuff), *available at* http://judiciary.house.gov/media/pdfs/printers/109th/26411v2.pdf.

In the third Mississippi letter, the Attorney General concluded that the 1991 statewide redistricting plan was "calculated not to provide black voters in the Delta with the equal opportunity for representation required by the Voting Rights Act." 1 *Section 5 History* 1411 (Letter from John R. Dunne, Assistant Attorney Gen., DOJ Civil Rights Div., to Hainan A.

Miller, Miss. Senate Elections Committee Chair (July 2, 1991)). According to the Attorney General, the legislative debate was "characterized by overt racial appeals." *Id.* at 1412. Congress heard testimony that when speaking on the floor of the state legislature, members referred to an alternative plan that would have increased the number of black majority districts as the "black plan"; privately, they called it the "nigger plan." *Modern Enforcement of the Voting Rights Act, Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 22 (May 10, 2006) (testimony of Robert B. McDuff), *available at* http://www.access.gpo.gov/congress/senate/pdf/109hrg/28342.pdf.

Scouring the legislative record ourselves, we have discovered many more section 5 objections based on discriminatory intent. In the Appendix to this opinion, we summarize a representative sample from Alabama, California, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia. *See infra* pp. 122-36. The District dismisses such objection letters as mere "anecdotes" that "come nowhere close to showing extraordinary circumstances or a 'systematic resistance to the Fifteenth Amendment.'" Pl.'s Mem. at 51 (quoting *Katzenbach,* 383 U.S. at 328). But Congress found to the contrary. Based on all the evidence, the House committee concluded that "voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982." H.R. REP. NO. 109-478, at 36 (2006); *cf.* H.R. REP. NO. 94-196, at 10 (1975) (renewing section 5 to prevent use of "at-large

elections, annexations of predominantly white areas, or the adoption of discriminatory redistricting plans").

More Information Requests

Congress discovered additional evidence of intentional discrimination in letters from the Attorney General asking jurisdictions seeking section 5 preclearance to provide additional information about their proposed changes. Known as "more information requests" ("MIRs"), these letters typically explain that the submitted information is "insufficient to enable [the Department] to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." 2 *Evidence of Continued Need* 2570 (Letter from Joseph D. Rich, Acting Chief, Voting Section, DOJ Civil Rights Div., to Wilbur T. Gamble III, Esq. (Apr. 17, 2000)). As the House Report explains, a jurisdiction seeking preclearance may respond by submitting the requested information "to prove a change is non-discriminatory" or by taking one of three actions: (1) withdrawing the requested change "because it is discriminatory"; (2) filing a "new or amended non-discriminatory voting plan"; or (3) offering no response. H.R. REP. NO. 109-478, at 40 (2006). In all three circumstances, the "MIR-induced outcome" has the same effect as an objection in that the submitting jurisdiction may not implement the proposed change. 2 *Evidence of Continued Need* 2545

(report of Luis Ricardo Fraga and Maria Lizet Ocampo).

The District insists that MIRs represent nothing more than "federal administrative browbeating," Pl.'s Opp'n at 70, but Congress thought otherwise. As the Attorney General emphasizes, the House committee found that MIR-induced outcomes "are often illustrative of a jurisdiction's motives." H.R. REP. NO. 109-478, at 40 (2006). Indeed, the committee found that together with objection letters, the increased number of revised submissions and withdrawals during the last 25 years represents "strong [evidence] of continued efforts to discriminate." *Id.* at 36. Recognizing that "[s]ection 5's reach in preventing discrimination is broad," Congress found that "[i]ts strength lies not only in the number of discriminatory voting changes it has thwarted, but . . . also [in] the submissions that have been withdrawn from consideration [and in] the submissions that have been altered by jurisdictions in order to comply with the [Act]." *Id.* In fact, in terms of enforcing section 5, MIRs have become nearly as important as formal objection letters. One study finds:

> A total of 792 objections were made to proposed changes during 1990-2005. . . . However, the sum of the outcomes of withdrawals, superseded changes, and no responses, resulting from an MIR, is 855. This means that MIRs have . . . directly affect[ed] 855 additional changes, making their implementation illegal.

2 *Evidence of Continued Need* 2552-53 (report of Luis Ricardo Fraga and Maria Lizet Ocampo). According to the same study, MIRs have actually become more important than objection letters, recently deterring six times as many changes. *Id.* at 2567, tbl. 10 (reporting ratio of MIR outcomes to objections from 1999 to 2005).

Texas stands as the covered jurisdiction most affected by MIRs, both overall and in proportion to the number of objection letters received since 1990. *Id.* at 2566 tbl. 9 (showing Texas with 290 MIR-induced outcomes, followed by Alabama with 148). In Louisiana, "no fewer than 17 . . . parishes [after receiving MIRs] chose to withdraw 22 submissions, most of them redistricting proposals, since the 1982 renewal." *Id.* at 1626 (appendix to statement of Wade Henderson). In Georgia, the city of Griffin asked the Attorney General to preclear a redistricting plan under which only two of the six single-member districts would be majority black even though the city's black population had recently increased from 42% to 49%. 1 *Evidence of Continued Need* 809-10 (appendix to statement of Nadine Strossen). The Attorney General requested more information, "but the city was not responsive." *Id.* at 809. Instead, the city abandoned the proposed change and announced it would hold elections using its existing "malapportioned" districts. *Id.* When the local NAACP sued, the city agreed to a plan with three majority-minority districts. In the next election, three African American candidates won. *Id.* at 810.

Judicial Preclearance Suits

Instead of requesting administrative preclearance from the Attorney General or after receiving an objection, a covered jurisdiction may seek a declaratory judgment from a three-judge panel of this court preclearing its proposed change. Like the Attorney General, the court can grant preclearance only if it finds the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the [language minority provisions]." 42 U.S.C. § 1973c(a). Although covered jurisdictions seek Attorney General preclearance far more frequently than they file declaratory judgment actions, Congress found that the latter shed light on section 5's impact: "Evidence of continued discrimination includes . . . the number of requests for declaratory judgments denied." 2006 Amendments § 2(b)(4)(B), 120 Stat. at 577. Specifically, evidence reveals that plaintiffs either withdrew their proposed changes or lost on the merits in twenty-five declaratory judgment actions filed since 1982. 1 *Evidence of Continued Need* 270 map 6 (report of Nat'l Comm'n on the Voting Rights Act). Texas and Mississippi tied for the lead, each accounting for six unsuccessful suits during that time. *Id.*

The legislative record contains several examples of judicial decisions denying preclearance that reveal evidence of intentional discrimination. For example, in a declaratory action filed by Pleasant Grove, Alabama – then an "all-white enclave in an otherwise racially

mixed area" with a "long history of racial discrimination" – the Supreme Court affirmed the district court's denial of preclearance for two annexations. *City of Pleasant Grove v. United States,* 479 U.S. 462, 464-65 (1987). While rejecting annexation petitions from two adjacent black neighborhoods, the town had sought to annex two other parcels: one vacant but "likely to be developed for use by white persons only," and the other inhabited by whites eager to send their children to the city's all-white schools rather than desegregated county schools. *Id.* at 465-66. Pleasant Grove insisted that its refusal to annex the black areas reflected economic considerations, not racial animus, but the Court affirmed the district court's finding that the economic argument was a "mere pretext" the city "developed after the fact." *Id.* at 470, 472. Finding it "quite plausible to see appellant's annexation[s] . . . as motivated, in part, by the impermissible purpose of minimizing future black voting strength," *id.* at 471-72, the Court affirmed the district court's determination that Pleasant Grove had failed to carry "its burden of showing that the annexations were untainted by a racially discriminatory purpose," *id.* at 469.

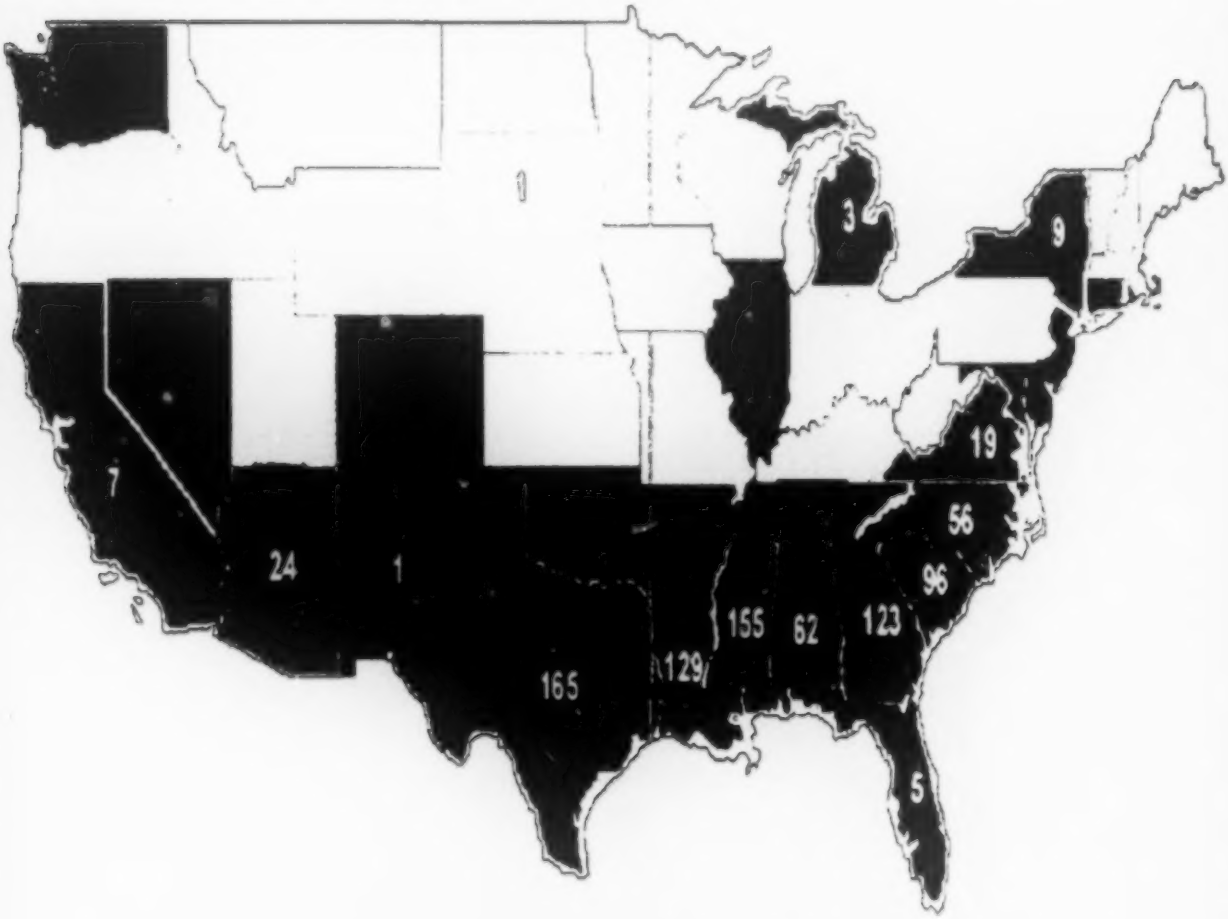
In another declaratory action, Louisiana admitted, according to the Attorney General, that it aimed "to diminish black electoral opportunity in order to increase the electoral opportunity of white voters." Def.'s Mem. at 30. Having failed to secure Attorney General preclearance for every single previous state

legislative redistricting plan, Louisiana sought a declaratory judgment preclearing its 2001 plan. *Reauthorizing the Voting Rights Act* 42-43 (statement of Debo P. Adegbile (counsel here for Louis intervenors)). According to testimony before Congress, that plan "eliminated a majority-black district in Orleans Parish but failed to create a comparable new opportunity for black voters anywhere else in the state." *Id.* at 43. Louisiana explained to the court that it aimed to ensure proportional representation for white voters within Orleans Parish. *Id.* at 43-44. At no point, however, did the state ever consider how to ensure proportional representation for voters of all races statewide. *Id.* at 43. Moreover, its plan "simply ignored" the increased number of black residents in Orleans Parish. *Id.* After evidence emerged that Louisiana had violated its own redistricting guidelines, the state abandoned the litigation on the eve of trial and restored the majority-black district. *Id.* at 44.

Congress heard testimony demonstrating the cumulative impact of failed judicial preclearance suits, objection letters, and MIRs. Map 9, on the next page, shows for each covered state the combined number of objections, submission withdrawals, and declaratory judgment actions favorable to minorities since August 1982. 1 *Evidence of Continued Need* 273 (report of Nat'l Comm'n on the Voting Rights Act). Two aspects of

MAP 9

Sum of Objections, Submission Withdrawals, and Declaratory Judgment Actions Favorable to Minorities (August 5, 1982 - 2004)*



Percent Nonwhite Voting-Age Population (2000) By Quintile

- 2.9 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.9
- 35.9 - 68.2

Section 5 Fully Covered States

Partially Covered States

*The sum in Alaska is three, and zero in Hawaii.

Created for the National Commission on the Voting Rights Act

the map warrant emphasis. First, it shows that section 5 has successfully blocked racial discrimination in voting throughout the covered states. Second, when compared to the number of post-1982 objections in Map 5A, *supra* p. 54, the combined totals in Map 9 reveal that section 5 has been far more effective in most states – especially Georgia, Mississippi, and Texas – than a mere count of objections would suggest.

Section 5 Enforcement Suits

When covered jurisdictions fail to submit voting changes for approval, either the Attorney General or private citizens may file suit under section 5 to compel preclearance. Failure to submit proposed changes strikes at the heart of the Voting Rights Act. As late as 1984, the Supreme Court acknowledged that "widespread noncompliance with the preclearance requirement . . . combined with the absence of an independent mechanism in the Justice Department to monitor changes, has permitted circumvention of the requirement which itself was designed to eliminate circumvention of the goals of the Act." *McCain v. Lybrand,* 465 U.S. 236, 249 (1984).

According to the House Report, "many defiant covered jurisdictions and State and local officials continue to enact and enforce changes to voting procedures without the Federal Government's knowledge," in part because the Attorney General lacks any "systematic way" to ensure that changes are submitted.

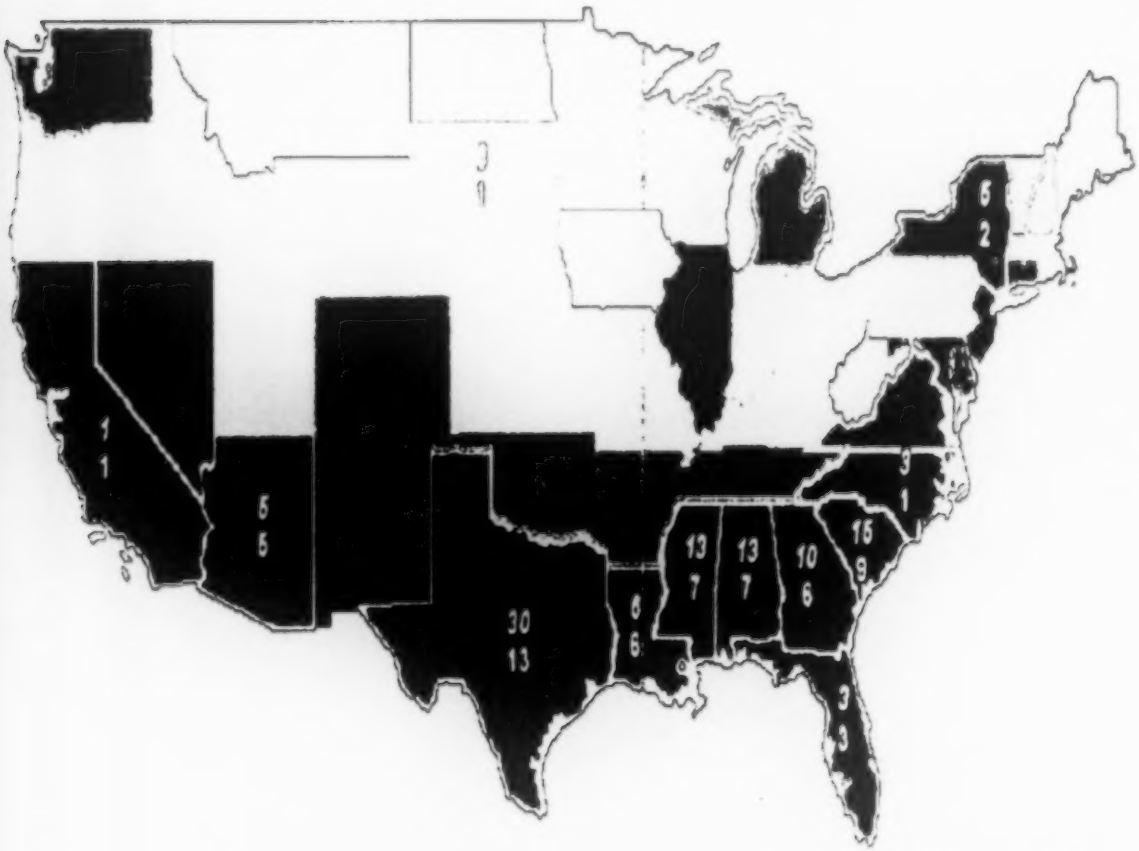
H.R. REP. NO. 109-478, at 41 (2006). The report observes that in *Lopez* the Supreme Court found that Monterey County "failed to seek Federal preclearance for any of its six consolidation ordinances." *Id.* at 42 (quoting *Lopez,* 525 U.S. at 273). The House committee expressed particular concern about "smaller, more rural communities within covered States," where section 5 enforcement suits play an important role because noncompliance is "extensive." *Id.* at 43. One study in the legislative record reports at least 105 successful section 5 enforcement actions between 1982 and 2004. 1 *Evidence of Continued Need* 250 tbl. 4 (report of Nat'l Comm'n on the Voting Rights Act). Map 11, on the next page, reveals that since 1982 the Attorney General has joined enforcement suits in almost every covered state. *Id.* at 281.

The House committee singled out South Dakota as "perhaps the most egregious" offender. H.R. REP. NO. 109-478, at 42 (2006). When two counties in South Dakota first became covered in 1975, the state attorney general derided "the preclearance requirement as a 'facial absurdity' and advised against compliance, stating 'I see no need to proceed with undue speed to subject our State laws to a 'one-man veto' by the United States Attorney General.'" *Id.* South Dakota then implemented more than six hundred voting changes, many of which "negatively impacted" the voting rights of Native American citizens in its covered counties, yet the state sought preclearance fewer than five times. *Id.* This defiance eventually prompted Native American plaintiffs to

file a section 5 enforcement suit that ended with a consent decree in which the state – after twenty-six years of noncompliance – finally promised to fulfill its preclearance obligations. *Id.*

Texas lost more enforcement suits than any other covered state, accounting for 29 of the 105 cases in which plaintiffs prevailed. 1 *Evidence of Continued Need* 250 tbl. 4 (report of Nat'l Comm'n on the Voting Rights Act). One such case arose in Waller County, a majority-white jurisdiction that contains the majority-black city of Prairie View, home to historically black Prairie View A & M University. *Id.* at 185-86. For years, county officials discouraged Prairie View students from voting: among other

MAP 11
Section 5 Enforcement Actions in Which Department of Justice Participated (1966-2004 and August 5, 1982-2004)*



Percent Nonwhite Voting Age Population (2000) By Quintile

- 2.9 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 69.2
- Section 5 Fully Covered States
- Partially Covered States

*Italicized numbers = Enforcement Actions 1966 - 2004
Bold/Shaded numbers = Enforcement Actions August 5 1982 - 2004

There were no enforcement actions in Alaska or Hawaii

Created by the National Commission on the Voting Rights Act

actions, the county registrar tried to prevent them from registering, and local prosecutors indicted them for "illegal voting" before dropping all charges. *Id.* at 185; *see Symm v. United States,* 439 U.S. 1105 (1979), *aff'g United States v. Texas,* 445 F. Supp. 1245 (S.D. Tex. 1978). When two Prairie View students ran for local office in 2004, the white district attorney (a former state judge) threatened to prosecute students for illegal voting. After being sued, the district attorney relented, but less than a month before the election, white county commissioners, aware that the primary would occur when students were away on spring break, reduced the time period for early voting. The NAACP filed suit under section 5, prompting the county to restore the full schedule for early voting. Five times as many students voted early as on the day of the primary, and the student running for a seat on the county's governing body narrowly prevailed. 1 *Evidence of Continued Need* 185-86 (report of Nat'l Comm'n on the Voting Rights Act). Another Texas case arose in Seguin. After the 2000 census revealed that Latinos had become a majority in five of the city's eight districts, Seguin proposed a redistricting plan that would have eliminated one of the majority-Latino districts. When the Attorney General signaled that preclearance was unlikely, Seguin withdrew its proposal and then "promptly closed the candidate filing period so no Latino could run in the election for that district." 1 *Section 5 History* 86 (testimony of Nina Perales (counsel here for Diaz intervenors)). When the Mexican American Legal Defense and Educational Fund filed a section 5 suit

and successfully enjoined the election timetable, Latinos "elected their candidate of choice to a majority of seats." *Id.*

Section 2 and Constitutional Litigation

Enforceable through suits filed by either the Attorney General or private parties, section 2 contains the Act's basic prohibition against racial discrimination in voting. 42 U.S.C. § 1973. Although section 2 requires no proof of discriminatory intent, several section 2 cases, together with decisions resting on the Constitution alone, include express findings of intentional racial discrimination – judicial determinations that represent "reliable evidence of actual voting discrimination." *Katzenbach,* 383 U.S. at 329. According to the Senate Report, "[s]ince 1982, six published cases have ended in a court ruling or a consent decree finding that [a] covered jurisdiction[ ] had committed unconstitutional discrimination against minority voters." S. REP. NO. 109-295, at 13 (2006). Those six cases arose in Alabama, Georgia, Texas, and Virginia. *Id.* at 65-70, app. I. Another study in the record listed eight additional decisions finding intentional discrimination or constitutional violations in covered jurisdictions between 1982 and 2005. *See Impact and Effectiveness* 986-91, 1062-64 (report of Ellen Katz). Congress thus knew of a combined total of fourteen judicial findings of intentionally discriminatory or unconstitutional state action across six covered states.

To be sure, this is not a great number of cases, especially compared to the large number of intent-based objection letters, but the relative scarcity of published judicial findings of intentional discrimination by covered jurisdictions is understandable. To begin with, section 5 preclearance has blocked hundreds of intentionally discriminatory changes in recent years, *see supra* pp. 60-61, reducing the need for section 2 litigation. Moreover, section 5 deters covered jurisdictions from even attempting to implement intentionally discriminatory changes. *See infra* pp. 85-87. As one witness explained, "the statistics [in studies of section 2 litigation] do not account for the fact that the existence of Section 5 itself functions as a deterrent to both retrogression and broader forms of voting discrimination in the covered jurisdictions." *Introduction to Expiring Provisions* 160 (written response of Theodore Shaw). Finally, compilations of *reported* cases necessarily exclude lawsuits that jurisdictions settled to avoid adverse rulings. Congress heard testimony that surveys of published opinions fail to "account for the vast number of Section 2 lawsuits that are resolved through pre-trial settlement or those suits that are dismissed because the jurisdiction adopted a remedial plan." *Id.* at 159. Acknowledging that "some plaintiffs failed to pursue their claims, many settled, and others saw their cases go to judgment" with no published opinion, one survey of reported cases observes that the total number of section 2 actions remains unknown. *Impact and Effectiveness* 974 (report of Ellen Katz). Congress, however, received testimony that although this

survey discovered only three successful section 2 cases in Georgia since 1982, "[a] closer examination reveals that there have been a total of 69 successful Section 2 suits in Georgia, with most victories resulting from settlements or other pre-trial resolution of the claims." *Introduction to Expiring Provisions* 159 (written response of Theodore Shaw). In the nine fully covered states, Congress also heard that since 1982 "there have been 653 successful claims overall that provided relief to plaintiffs in various forms," many times the number of successful published cases identified in surveys of reported decisions. *Id.*

Though few in number, the section 2 decisions contained in the legislative record offer powerful evidence of continuing intentional discrimination. A particularly egregious example, *Dillard v. Town of North Johns,* 717 F. Supp. 1471 (M.D. Ala. 1989), followed a wave of litigation challenging racially discriminatory at-large electoral systems in cities and counties throughout Alabama. *See, e.g., Dillard v. Baldwin County Bd. of Educ.,* 686 F. Supp. 1459 (M.D. Ala. 1988). After conceding that its at-large system violated section 2, North Johns signed a consent decree requiring the creation of five single-member town council districts. *North Johns,* 717 F. Supp. at 1473. Prior to the first election under the new system, however, Alabama enacted a law requiring candidates for municipal office to file financial disclosure forms, and the town's white mayor helped every candidate other than the two black candidates comply with the new requirement. *Id.* at 1473-75.

Asking the town clerk for assistance, one black candidate was referred to an office that had no forms and whose staff suggested he need not file. *Id.* at 1475. The candidate then sought help directly from the mayor, who "refused to assist him." *Id.* Nonetheless remaining on the ballot, the two black candidates won, but the mayor refused to swear them in and the town clerk sued to prevent them from taking office because they had failed to file the appropriate forms. *Id.* The district court ruled that "North Johns, through its mayor, intentionally discriminated against [the black candidates] because of their race." *Id.* at 1476.

Other examples of judicial findings of intentional discrimination include:

- *Harris v. Siegelman,* 695 F. Supp. 517 (M.D. Ala. 1988).

  Black residents of Alabama challenged the treatment of black voters at polling places and the manner in which the state appointed poll officials. The district court found that the state had an official policy of appointing only white poll officials and of "keeping the electoral process closed to black citizens, a policy enforced both by law as well as through the use of fraud, force and intimidation, often by poll officials." *Id.* at 525. The court also found that two features of a racially inspired 1893 law – requiring voters seeking assistance to swear an oath of illiteracy and limiting voters to

five minutes in the voting booth – remained in effect and continued to have a racially discriminatory impact. Witnesses testified that polling officials used the five-minute rule to harass black voters and refused to assist black voters either "because they did not meet the state's rigorous assistance standard or because the white poll officials arbitrarily decided that assistance was not needed." *Id.* at 526. The court found that the challenged policies and 1893 statute "are products of intentional discrimination and . . . continue today to have their intended discriminatory effects." *Id.*; *see also Impact and Effectiveness* 991 (report of Ellen Katz).

- *United States v. Charleston County*, 316 F. Supp. 2d 268 (D.S.C. 2003).

  The United States and African American residents challenged the county's at-large system for council elections. While finding that the at-large system violated section 2, the district court rejected plaintiffs' claim that the system was adopted with discriminatory intent, observing: "Certainly the timing of the General Assembly's adoption of the at-large system raises suspicions, but the Court will not disparage its authors without more compelling evidence" of intentional discrimination. *Id.* at 306. The court nonetheless "agree[d] that there is significant evidence of intimidation and

harassment and by a preponderance of the evidence" made several findings of intentional discrimination. *Id.* at 287 n.23. First, "poll managers were assigned to the majority-African American precincts who caused confusion, intimidated African-American voters, and had the tendency to be condescending to those voters." *Id.* Moreover, one election commissioner had "received complaints from African-American voters concerning rude or inappropriate behavior by white poll officials in every election between 1992 and 2002," while an attorney who worked as an election observer testified that from 1980 through 2000 "[e]very time, every election we would have controversies in African-American precincts about voter assistance, or just the way voters are treated when they vote." *Id.* at 287-88 n.23 (alteration in original). Indeed, "[s]everal white poll managers – including a future chairperson of the Election Commission – were routinely appointed as poll managers by the Election Commission and assigned to predominantly African-American polling places in Charleston County, where they intimidated and harassed African-American voters." *Id.* at 288 n.23. One "particularly problematic" white poll manager had such a severe record of harassing black voters that the county's circuit court "issue[d] a restraining order against the Election Commission requiring its agents to cease

interfering with the voting process." *Id.* Yet even after being made aware of this misconduct, "the Election Commission . . . had some difficulty removing him from his position as election manager." *Id.* In 1990 "a member of the . . . Election Commission and others participated in a Ballot Security Group that sought to prevent African-American voters from seeking assistance in casting their ballots." *Id.* at 289 n.23. Although white poll managers often complained that blacks sought to vote improperly, a former Election Commission chair "never once found merit to any such allegations." *Id.* Finally, the court expressed "particular concern over two recent episodes of racial discrimination against African-American citizens." *Id.* In the first, the county council "reduced the salary for the Charleston County Probate Judge in 1991, following the election of the first and only African-American person elected to that position" – a judge "whose election was upheld by the South Carolina Supreme Court and who was still forced to seek the Justice Department's intervention to be sworn into office." *Id.* at 289-90 n.23. In the second episode, after African Americans for the first time won a majority of seats on the county school board, "the Charleston County Legislative Delegation to the South Carolina General Assembly sponsored several pieces of legislation to alter

the method of election for the school board" without contacting board members to seek their views on the proposed changes. *Id.* at 290 n.23. On appeal, while affirming the section 2 violation, the Fourth Circuit explained that "we do not need to reach the private plaintiffs' claim that the at-large system violated § 2 by intentionally discriminating against minority voters." *United States v. Charleston County,* 365 F.3d 341, 347 n.2 (4th Cir. 2004); *see also* H.R. REP. NO. 109-478, at 39-40 & n.87 (2006); *Impact and Effectiveness* 987-88 (report of Ellen Katz).

- *Williams v. City of Dallas,* 734 F. Supp. 1317 (N.D. Tex. 1990).

  African American and Hispanic residents of Dallas, Texas, challenged the city council's eight single-member districts and three at-large seats. Ruling that the system violated section 2, the district court found that "[t]he present configuration of single-member districts intentionally packs and cracks the African-American population with the effect of diluting their vote for the purpose of maintaining the political power of whites." *Id.* at 1409; *see also Impact and Effectiveness* 990 (report of Ellen Katz).

- *League of United Latin Am. Citizens v. Midland Indep. Sch. Dist.,* 648 F. Supp. 596 (W.D. Tex. 1986).

Hispanic and black residents of Midland, Texas, challenged the at-large system for electing school district trustees, alleging that it violated the Fourteenth and Fifteenth Amendments. The district court, citing a legacy of intentional discrimination, found unconstitutional not only the original at-large system, but also two alternative plans the school district proposed to implement. *Id.* at 607-10; *see also* S. REP. NO. 109-295, at 67-68 (2006); *Impact and Effectiveness* 1097-98 n.497, 1260.

- *Political Civil Voters Org. v. City of Terrell,* 565 F. Supp. 338 (N.D. Tex. 1983).

  Under the Charter of Terrell, Texas, which provided for five at-large city council seats, council members ran for numbered positions with staggered terms subject to a majority-vote requirement. Pursuant to a settlement of an earlier voting rights case, the city agreed to hold a referendum on converting to single-member districts. Although the referendum passed, the city council determined that the election was merely a "straw vote" and scheduled a second referendum to amend the Charter. That referendum, with "much smaller turnout," failed. *Id.* at 341. Plaintiffs then sued, and the district court found not only that this two-tiered amendment procedure departed from local and state law, but also that the city had failed to

submit it for section 5 preclearance. *Id.* In light of the city's tenuous explanations for maintaining the at-large system, its refusal to establish a second polling place, and its requirement that all candidates for public office own real property, the court found "discriminatory intent in the maintenance of the current election system." *Id.* at 349; *see also Impact and Effectiveness* 991 (report of Ellen Katz).

- *Pegram v. City of Newport News,* No. 4:94cv79 (E.D. Va. Nov. 4, 1994) (consent decree).

  The American Civil Liberties Union, representing African American voters, filed suit challenging the city council's at-large electoral system. The United States filed a parallel action, and the district court consolidated the cases. Within months, the city admitted that the at-large system violated section 2 as well as the Fourteenth and Fifteenth Amendments and signed a consent decree requiring it to create racially nondiscriminatory districts. *See also* S. REP. NO. 109-295, at 68 (2006).

For still another example of a section 2 suit revealing evidence of intentional discrimination, the Attorney General calls our attention to the Supreme Court's recent decision in *LULAC,* 126 S. Ct. 2594. The Court issued this high-profile decision only a few weeks before the House and Senate voted on the 2006

Amendments. Although the Attorney General had precleared Texas's 2003 redistricting plan, the Court found the plan "damaging to . . . Latinos" and bearing "the mark of intentional discrimination that could give rise to an equal protection violation." *Id.* at 2622. Finding that Texas drew the district in question precisely to divide "those Latinos who were becoming most politically active," the Court ruled that the state had "undermined the progress of a racial group that has been subject to significant voting-related discrimination." *Id.* at 2621-22. "In essence," the Court concluded, "the State took away the Latinos' opportunity because Latinos were about to exercise it." *Id.* at 2622.

Federal Election Observers

Section 8 of the Voting Rights Act authorizes the Attorney General to ask the Office of Personnel Management to assign federal observers to monitor polling places in covered jurisdictions. 42 U.S.C. § 1973f. Election observers monitor whether persons entitled to vote are in fact permitted to do so and whether votes cast are properly counted. According to the House Report, the Attorney General has assigned between 300 and 600 observers each year since 1982. H.R. REP. NO. 109-478, at 44 (2006).

Contrary to the District's assertion that the appointment of observers rests on a "presumption of bad faith," Pl.'s Opp'n at 69, Congress found that the Attorney General certifies observers "only when there

is a reasonable belief that minority citizens are at risk of being disenfranchised," often through "harassment and intimidation inside polling locations," H.R. REP. NO. 109-478, at 44 (2006). According to the Attorney General, Congress properly concluded that observer appointments provide "another indicator of actual or potential vote discrimination." Def.'s Mem. at 34. Appointments signal actual discrimination because "observers are often sent to covered jurisdictions precisely because minority voters have faced discrimination in such jurisdictions in recent elections." *Id.* at 35. Appointments also flow from the Attorney General's predictive judgment – typically informed by "communication among Voting Section lawyers and local officials, minority leaders, and U.S. Attorneys" – regarding the potential for discrimination in upcoming elections. 1 *Evidence of Continued Need* 179 (report of Nat'l Comm'n on the Voting Rights Act).

Witnesses described many examples of the very type of voter intimidation that usually leads to the appointment of observers. For instance, in Harris County, Texas, one man testified that during a 2000 election he was "arrested because he insisted that he be able to vote. He went to cast a vote at the local church where his mom votes but he was told that he was registered to vote on another side of town. . . . The police officer charged him with trespassing." 3 *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 3060 (Mar. 8,

2006) (report of Orville Vernon Burton), *available at* http://judiciary.house.gov/media/pdfs/printers/109th/26411v3.pdf. Other witnesses testified that Hispanic voters in Texas and southern Arizona were "admonished not to use Spanish when talking in the polling places and when giving assistance to voters who needed help when voting." *Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 34 (Nov. 15, 2005) ("*Federal Examiner and Observer Program*") (statement of Barry H. Weinberg), *available at* http://judiciary.house.gov/media/pdfs/printers/109th/24606.pdf. Testimony also revealed that poll workers demanded that Latino voters produce evidence of citizenship before receiving a ballot, a requirement never imposed on non-Hispanic white voters. *Id.* The House Report highlights *United States v. Conecuh County, Alabama,* Civil Action No. 83-1201-H (S.D. Ala. June 12, 1984), where observer testimony was "instrumental in enabling Federal prosecutors to proceed." H.R. REP. NO. 109-478, at 44 (2006). Responding to interrogatories in that case, one observer testified that a white poll worker, when providing assistance to a black voter, asked "Do you want to vote for white[s] or niggers?" *Federal Examiner and Observer Program* 30 (statement of Barry H. Weinberg). This poll worker identified the black candidates, stated "with respect to one white candidate . . . 'This is who the blacks are voting for,'" and "made further reference to black citizens as 'niggers' . . . , including a statement that 'niggers don't have

principle enough to vote and they shouldn't be allowed.'" *Id.*

Racially Polarized Voting

The House committee found that racially polarized voting, which occurs "when voting blocs within the minority and white communities cast ballots along racial lines," represents a "serious concern" in two respects. H.R. REP. NO. 109-478, at 34 (2006). First, aside from "districts in which minority voters control the elections," racially polarized voting effectively places an "election ceiling" on minority voters, leaving them "powerless to elect their candidates." *Id.* Second, the committee found "[t]he potential for discrimination in environments characterized by racially polarized voting is great." *Id.* at 35. In fact, as the Attorney General explains, racial bloc voting is "a necessary precondition for vote dilution to occur." Def.'s Mem. at 44 (quoting 1 *Evidence of Continued Need* 126). Bloc voting by whites, for example, enables the use of devices such as multi-member districts and at-large elections that dilute the voting strength of minority communities.

Congress heard testimony that the "degree of racially polarized voting in the South is increasing, not decreasing." H.R. REP. NO. 109-478, at 34 (2006) (citation omitted). The House Report cites federal court findings of racially polarized voting by whites, blacks, Latinos, and Native Americans in Florida, Louisiana, South Carolina, South Dakota, and Texas.

Id. at 34-35. The committee also reported that in the 2000 election few African Americans and no Hispanic or Native American candidates won office in majority-white districts. *Id.* at 34. Based on this evidence, the committee concluded that racially polarized voting revealed "continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process." *Id.* As a consequence, Congress found, "continued evidence of racially polarized voting in each of the [covered] jurisdictions . . . demonstrates that racial and language minorities remain politically vulnerable, warranting the [Act's] continued protection." 2006 Amendments § 2(b)(3), 120 Stat. at 577.

The District insists that these legislative findings are irrelevant because "racially polarized voting is not state action" and state action is the "only appropriate target for Congress's enforcement powers." Pl.'s Mem. at 49. One dissenter in *City of Rome* made just this argument, but the Court explained that "racial bloc voting" was one factor the Attorney General and the district court properly relied on in refusing to preclear certain electoral changes proposed by Rome. *City of Rome,* 446 U.S. at 161-62, 183; *id.* at 216-17 (Rehnquist, J., dissenting) (arguing that because "[a]ny disparate impact" from the proposed changes "results from . . . private rather than governmental discrimination," the refusals to preclear "do not implicate congressional power to devise an effective remedy for prior constitutional violations by local governments"). The Court reiterated the relevance of

racial bloc voting in its recent decision in *LULAC,* 126 S. Ct. 2594. In concluding that a Texas redistricting plan violated section 2's vote dilution provision, the Court highlighted the district court's finding that racially polarized voting, which was common "throughout the State," had reached such "especially severe" levels in one district that "the Anglo citizen voting-age majority will often, if not always, prevent Latinos from electing the candidate of their choice." *Id.* at 2615.

Section 5's Deterrent Effect

In addition to all the foregoing evidence, Congress heard extensive testimony demonstrating that section 5 prevents discriminatory voting changes in a less visible but undeniably powerful manner, operating "under the radar screen [in ways] that may not appear easily in statistics." *Introduction to Expiring Provisions* 17 (testimony of Theodore Shaw). For example, a former head of the Justice Department's Voting Section with more than three decades of experience in the Civil Rights Division stated:

> The number of times that the Attorney General objects to voting changes is very small – less than one percent of the Section 5 submissions are objected to. But that is not a good indicator of the importance of Section 5. Rather, the most important impact of Section 5 is its deterrent effect on discriminatory voting changes. Jurisdictions, particularly local jurisdictions, that are required to get preclearance

> must always be aware of Justice Department review. Because the Department has built a tradition of excellence and meticulousness in its Section 5 review process, jurisdictions will think long and hard before passing laws with discriminatory impact or purpose.

Impact and Effectiveness 66 (statement of Joseph D. Rich). This official explained that he had "often heard examples of this deterrent effect, e.g. careful consideration of [the] discriminatory impact of a voting change during the legislative process, and minority elected officials reminding white officials of the need for [J]ustice [D]epartment review of laws under consideration." *Id.* Making this same point, one experienced voting rights litigator urged Congress to "pay attention . . . to the proposals that are floated, and that never even get off the ground because it's understood that they will not get precleared. . . . [H]alf the time, we never see what might happen and what would happen if we didn't have section 5." *Examination of Scope and Criteria for Coverage* 98 (testimony of Armand Derfner). Many other witnesses likewise emphasized section 5's deterrent effects. *See, e.g., Understanding the Benefits and Costs of Section 5 Pre-clearance, Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 94-95 (May 17, 2006) (responses of Fred Gray), *available at* http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=109_senate_hearings&docid=f:29625.pdf; *The Continuing Need for Section 5 Pre-clearance, Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 14-15 (May 16, 2006) ("*Continuing Need for Pre-clearance*") (testimony of

Anita S. Earls), *available at* http://www.access.gpo.gov/congress/senate/pdf/109hrg/28753.pdf; 1 *Evidence of Continued Need* 34-35 (statement of Nadine Strossen).

Beyond expert testimony, the record contains several concrete examples of section 5 quietly but effectively deterring discriminatory changes. In some cases, jurisdictions reacted to previous objections by altering their behavior. For example, after the Attorney General objected to Alaska's post-1990 state legislative redistricting plans, the state "took specific measures [in the 2000 redistricting cycle] to ensure that it did not reduce Alaska Native voting strength in districts where Alaska Natives had a reasonable opportunity to elect candidates of their choice." 1 *Evidence of Continued Need* 92 (statement of Joe Rogers). Elsewhere section 5's deterrent effect proved so potent that formal objections were unnecessary to thwart discriminatory voting changes; all the Attorney General had to do was indicate informally that preclearance was unlikely. Consider again Seguin, Texas, where the 2000 census showed that Latinos had become a majority in five of eight city council districts. *See supra* p. 73. With the council split between four Latinos and four Anglos, the city proposed a redistricting plan that would have dismantled one of the majority-Latino districts. When the Justice Department warned it would probably object, the city withdrew its submission. 1 *Section 5 History* 86 (testimony of Nina Perales). In still other cases,

covered jurisdictions decided against proposing certain changes once they realized the proposals would prompt objections. In 2002, for example, officials in Fredericksburg, Virginia, which has long had one majority-black district, considered eliminating that district, believing that recent Supreme Court cases permitted it to do so. Only after the city attorney explained, "listen, you can't do it . . . under any interpretation of [section 5]," did the city council agree to retain the majority-black district. 1 *Evidence of Continued Need* 362 (statement of Kent Willis); *see also id.* at 92 (testimony of Joe Rogers).

Crediting such testimony, the House committee described preclearance as a "vital prophylactic tool[ ]," concluding that discrimination and racial disparities would have been far greater but for section 5's deterrent effect. H.R. REP. NO. 109-478, at 21 (2006); *see also id.* at 57. The committee found that "[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes is the number of voting changes that have never gone forward as a result of Section 5." *Id.* at 24. For support, the committee quoted testimony that "[o]nce officials in covered jurisdictions become aware of the logic of preclearance, they tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result." *Id.* (quoting 1 *Evidence of Continued Need* 177 (report of Nat'l Comm'n on the Voting Rights

Act)). The committee thus concluded that "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." *Id.*

B.

Comparing the foregoing summary to the record Congress amassed in 1975, we return to the question posed at the outset: does the 2006 legislative record contain sufficient evidence of contemporary discrimination in voting to justify Congress's decision to subject covered jurisdictions to section 5 preclearance for another twenty-five years? In answering this question, we emphasize that under *Katzenbach* our duty as judges is not to decide whether we would have voted to extend section 5, but rather to determine whether Congress's decision to do so was rational. To repeat: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach,* 383 U.S. at 324. In our view, Congress satisfied that standard.

To begin with, as in 1975, Congress approached its task seriously and with great care. It held extensive hearings and compiled a massive legislative record documenting contemporary racial discrimination in covered states. In particular, with respect to registration rates, minority elected officials, and Attorney General objections – the three indicators considered significant in *City of Rome* – the 2006

legislative record looks much like the evidence Congress compiled in 1975. As then, "[s]ignificant disparit[ies]" remain in registration rates "in at least several of the covered jurisdictions." *City of Rome*, 446 U.S. at 180. In 1975 Congress reported registration disparities between whites and blacks of 16 to 24 points in Alabama, Louisiana, and North Carolina; in 2006 it found similar 11 to 31 point gaps between whites and either African Americans or Latinos in three other states – Florida, Texas, and Virginia. As for minority elected officials, African American candidates have continued to make significant gains, but as in 1975, Congress found that progress remained uneven. In 1975 Congress reported that no blacks held statewide office in seven covered states and that the number of black state legislators in covered states fell far short of proportional representation. Likewise, in 2006 Congress found that African American candidates had yet to win statewide office in Louisiana, Mississippi, and South Carolina, and that in six covered states where African Americans constituted 35% of the population, they accounted for only 21% of state legislators. As to the third *City of Rome* factor, although section 5 objection rates have fallen since 1975, the rate has always been low and the Attorney General continues to interpose large numbers of objections – in fact, more since 1982 than before.

The 2006 legislative record contains far more than the statistical evidence considered sufficient in *City of Rome*. Most important, it includes extensive contemporary evidence of intentional discrimination.

During the two decades from 1980 to 2000, the Attorney General issued objection letters that blocked 421 intentionally discriminatory voting changes. Twenty-five requests for declaratory judgments were either denied or withdrawn, some due to evidence of discriminatory intent. Through more information requests, the Attorney General deterred hundreds of other voting changes, many of which Congress believed were intentionally discriminatory. Since 1982 plaintiffs have filed at least 105 successful section 5 enforcement suits against nine covered states whose officials refused to submit voting changes for preclearance. In addition, federal courts have found intentional discrimination or unconstitutional state action by covered jurisdictions in fourteen section 2 cases. During the same time, the Attorney General, responding to reports of actual or likely intimidation of minority voters, appointed tens of thousands of election observers to monitor polling places in covered jurisdictions. Furthermore, testimony indicated that racially polarized voting in the South is increasing, not decreasing, thus perpetuating minority vulnerability to continued discrimination in voting. Though powerful in and of itself, all this evidence becomes even more compelling given Congress's finding that section 5's preclearance requirement has deterred covered jurisdictions from even attempting to implement an unknown and unknowable number of such changes.

In view of this extensive legislative record and the deference we owe Congress under *Katzenbach's*

rationality standard, we see no constitutional basis for rejecting Congress's considered judgment that "[d]espite the substantial progress that has been made, the evidence before the Committee resembles the evidence before Congress in 1965 and the evidence that was present again in 1970, 1975, [and] 1982" – evidence the Supreme Court twice found sufficient to justify section 5. H.R. REP. NO. 109-478, at 6 (2006). To be sure, "it may well be true that today the statute is maintaining strict federal controls that are not as necessary or appropriate as they once were," *Riley v. Kennedy,* No. 07-77, slip op. at 1 (U.S. May 27, 2008) (Stevens, J., dissenting), but that hardly means Congress's decision to extend section 5 was irrational. Although no one can know for sure what would happen if section 5 were allowed to expire, Congress considered the evidence before it and determined that "failure to reauthorize the temporary provisions, given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action," which history demonstrates is "not enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process." H.R. REP. NO. 109-478, at 57 (2006). That predictive judgment deserves particular respect because, as in the case of the 1975 reauthorization upheld in *City of Rome,* Congress was evaluating not the need for new legislation, but rather the deterrent effect of a statute that had been in place for decades. Its judgment thus rested on experience, requiring less in the way of conjecture than when Congress enacts legislation for

the first time. We must "'accord substantial deference to the predictive judgments of Congress,' particularly when . . . those predictions are so firmly rooted in relevant history and common sense." *McConnell v. FEC*, 540 U.S. 93, 165 (2003) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)) (sustaining constitutionality of Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, in view of experience under Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-455).

A final issue requires our consideration: the length of the 2006 extension. The provisions upheld in *Katzenbach* and *City of Rome* expired in five and seven years respectively, whereas when Congress reauthorized section 5 in 2006, it followed its 1982 precedent and extended the provision for another twenty-five years. We see nothing irrational in that decision. To begin with, neither *Katzenbach* nor *City of Rome* even hints that the relatively short expiration dates were critical to the constitutionality of the statutes at issue in those two cases. Moreover, in 2006 Congress considered an amendment that would have extended the law for only nine years, but following extensive floor debate, the House overwhelmingly rejected it. *See* 152 Cong. Rec. H5143-204 (daily ed. July 13, 2006). Opponents of the amendment argued that given that most section 5 activity "occurs during redistricting, which only happens every 10 years following each census," a shorter extension would "capture only one redistricting cycle, and that will not provide enough evidence . . . to allow Congress to

make the same reasoned determination regarding renewal 10 years from now that this Congress is allowed to make on the previous record of 25 years." *Id.* at H5187 (statement of Rep. Sensenbrenner). The amendment's opponents also pointed out that because jurisdictions seeking bailout must demonstrate compliance with the Act's requirements for the previous ten years, a nine-year renewal "would completely nullify the current incentive [for] covered jurisdictions to maintain clean voting rights records." *Id.* The 1982 Congress made exactly the same point in deciding to extend section 5 for twenty-five years rather than a shorter period. *See* S. REP. NO. 97-417, at 60 (1982) ("If the duration of Section 5 were too short, then there would be no incentive for any jurisdiction to make the good record that will allow them to bail out."). Furthermore, even as Congress followed the 1982 precedent and extended section 5 for another twenty-five years, it obligated itself to "reconsider" the provision after fifteen years. 2006 Amendments § 4, 120 Stat. at 580 (codified at 42 U.S.C. § 1973b(a)(7), (8)). Congress thus determined that a twenty-five-year extension was "appropriate given the near century of discrimination the Act is designed to combat." H.R. REP. NO. 109-478, at 57-58 (2006). We see no basis for questioning this quintessentially legislative judgment. As the Supreme Court has instructed, courts evaluating whether a statutory time period is rational "are not at liberty to second-guess congressional determinations and policy judgments of this order." *Eldred,* 537 U.S. at 208 (finding Congress's decision to extend the terms of existing

copyrights to be "a rational" exercise of "Congress' power under the Copyright Clause").

In sum, reviewing the massive amount of evidence Congress collected – only some of which we have summarized above – leaves us with no doubt that despite the "undeniable" political progress made by minorities, "Congress could rationally have concluded" that it was necessary to extend section 5 for another twenty-five years. *City of Rome,* 446 U.S. at 177, 181. As in *Katzenbach,* "Congress had reason to suppose" that covered states "might try" to evade the Act's remedies. *Katzenbach,* 383 U.S. at 335. As in *City of Rome,* Congress aimed "to counter the perpetuation of [decades] of pervasive voting discrimination." *City of Rome,* 446 U.S. at 182. And as in 1975, Congress gave "careful consideration" not just to the extensive record it developed, but to whether section 5 remains an appropriate response to the problem of continued racial discrimination in voting. *City of Rome,* 446 U.S. at 181. Like the Supreme Court in *City of Rome,* we thus "decline [the District's] invitation to overrule Congress' judgment that the [2006] extension was warranted." *Id.* at 180.

V.

As we have just demonstrated, the 2006 reauthorization satisfies *Katzenbach's* rationality standard. In our view, this should end the matter. But because the District insists that *City of Boerne's* congruence and proportionality test applies to voting

rights legislation enacted under the Fifteenth *or* Fourteenth Amendments – a result we believe would require overruling *Katzenbach*, *Morgan*, and *City of Rome* – we nonetheless proceed in this section to address the District's argument that section 5, although congruent and proportional when upheld in *Katzenbach* and *City of Rome,* no longer satisfies that standard given "the facts on the ground in 2006." Pl.'s Mem. at 43. Congress's task, the District believes, was to "demonstrate a sufficient nexus between a regime that burdens thousands of local entities with a requirement that they seek federal permission for every minute change affecting voting" and the prevention of contemporary racial discrimination in voting. *Id.* at 46. According to the District, Congress failed to clear that "high evidentiary hurdle" in enacting the 2006 Amendments. *Id.* at 43.

Defending the statute, the Attorney General, supported by the Diaz intervenors, argues that Congress's twin findings that section 5 has prevented voting discrimination and that covered jurisdictions continue discriminating "establish that Section 5 remains a congruent and proportional means of enforcing the Constitution's prohibition on race and national origin discrimination in voting." Def.'s Mem. at 8-9; *see also* Diaz Mem. at 8-10. NAACP intervenors agree, arguing that "[e]ven absent binding precedent" from *Katzenbach* and *City of Rome,* "[u]nder the analytic framework that the Court has set forth in *Boerne* and its progeny, Section 5 – Congress's response to a pattern of constitutional violations

dating back well over a century and continuing to this day – easily passes muster." NAACP Mem. at 35.

As we explained in Part IIIB, *see supra* pp. 32-36, the test established in the *City of Boerne* line of cases involves three steps. First, we must "identify with some precision the scope of the constitutional right at issue," i.e., the appropriate level of judicial scrutiny for the right that Congress aims to enforce. *Garrett*, 531 U.S. at 365. Second, we examine "the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" *Fla. Prepaid*, 527 U.S. at 639-40 (omission in original) (quoting *City of Boerne*, 521 U.S. at 525). If the right Congress seeks to protect receives heightened scrutiny, Congress can more easily establish the necessary record of unconstitutional state conduct. Using voting rights as an example, the Court explained in *Hibbs*:

> Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test . . . it was easier for Congress to show a pattern of state constitutional violations [in *Hibbs* than in *Garrett* or *Kimel*]. Congress was similarly successful in *South Carolina v. Katzenbach*, where we upheld the Voting Rights Act of 1965: Because racial classifications are presumptively invalid, most of the States' acts of race discrimination violated the Fourteenth Amendment.

Hibbs, 538 U.S. at 736 (citations omitted). At the third and final step, we evaluate whether the statutory scheme to remedy and prevent violations of the protected right is congruent and proportional to the record Congress developed and to the risk of future constitutional harm. The "appropriateness of remedial measures must be considered in light of the evil presented," because "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *City of Boerne,* 521 U.S. at 530. Hence, the greater the level of scrutiny and the stronger the record of violations, the more deference Congress deserves in crafting enforcement schemes that may "prohibit[ ] conduct which is not itself unconstitutional and intrude[ ] into 'legislative spheres of autonomy previously reserved to the States.'" *Id.* at 518 (quoting *Fitzpatrick v. Bitzer,* 427 U.S. 445, 455 (1976)).

A.

We begin with the first step: the nature of the constitutional right Congress sought to protect. Recall that the statutory provisions struck down in *Kimel* and *Garrett* enforced rights receiving only rational basis review. *See Kimel,* 528 U.S. at 83 (age discrimination); *Garrett,* 531 U.S. at 366-68 (disability discrimination). The statutes challenged in *Hibbs* and *Lane* fared better because both protect rights subject to heightened scrutiny. ADA Title II, upheld in *Lane,* implicates strict scrutiny insofar as the statute protects the fundamental right of access to courts.

Lane, 541 U.S. at 530-31 ("[T]he question presented in this case is . . . whether Congress had the power under § 5 to enforce the constitutional right of access to the courts."). The FMLA, upheld in *Hibbs,* is designed to combat gender classifications subject to heightened scrutiny. *Hibbs,* 538 U.S. at 736. By contrast, the 2006 extension of section 5 simultaneously enforces two rights, each of which receives the highest level of judicial scrutiny. Specifically, Congress aimed to prevent discrimination based on race, a suspect classification, in the context of the fundamental right to vote, a liberty "preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). As a consequence, our deference here is at its zenith.

The District argues that "the importance of [the] right does not . . . alter the nature or stringency of the test for congruence and proportionality." Pl.'s Opp'n at 53. But the District cites no authority to support this assertion, and for good reason: *Kimel, Garrett, Hibbs,* and *Lane* are to the contrary. Essentially conceding the point, the District contends that even if Congress can more easily show a pattern of constitutional violations in the context of rights or classes that receive heightened scrutiny, section 5 goes too far because "only a minute portion of the activity" it touches is unconstitutional. *Id.* at 54. In *City of Boerne,* however, the Court reiterated what it has said again and again since *Katzenbach,* namely that legislation enforcing the Civil War Amendments can "prohibit[ ] conduct which is not itself unconstitutional." *City of Boerne,* 521 U.S. at 518; *see also Fla.*

Prepaid, 527 U.S. at 638; *Kimel,* 528 U.S. at 81; *Garrett,* 531 U.S. at 365. Moreover, as *Hibbs* and *Lane* demonstrate and as we show in Part VC below, the Court gives Congress significant leeway to craft broad remedial prohibitions when fundamental rights or protected classes are at stake. *See infra* pp. 104-07.

At oral argument, NAACP counsel suggested that where, as here, two rights receiving strict scrutiny are at stake, *Katzenbach's* rationality standard and *City of Boerne's* congruence and proportionality test may well converge. Because there is less risk that Congress will "actually try to change the substance of the constitutional provision" when it focuses on the "specific overlap of race and voting," counsel observed, "I think that does help to explain . . . why in *City of Boerne* the Supreme Court expressly said what we are doing here is really very consistent with *South Carolina v. Katzenbach.*" Mots. Hr'g Tr. at 86-87 (Sept. 17, 2007). The Supreme Court, however, has yet to address this issue, and we need not do so here. As we explain in this section, the 2006 extension passes muster as congruent and proportional, especially when compared to the statutes the Court upheld in *Hibbs* and *Lane,* each of which protects only one right receiving heightened scrutiny.

B.

That section 5 protects against racial discrimination in voting has critical implications for our consideration of *City of Boerne's* second step – the record of

constitutional violations. As in *Hibbs*, "it was easier for Congress to show a pattern of state constitutional violations" in enacting the 2006 Amendments than it is when Congress seeks to protect rights subject to rational basis review because racial classifications and restrictions on the right to vote – like gender discrimination (*Hibbs*) and restrictions on access to courts (*Lane*) – are "presumptively invalid." *Hibbs*, 538 U.S. at 736. In Part IV A we catalogued some of the enormous quantity of evidence of racial discrimination in voting by covered jurisdictions that Congress collected when considering the 2006 extension of section 5. Rather than repeating those findings here, we simply highlight two comparisons that give us confidence that this record suffices to justify remedial legislation.

First, as we have already noted, the 2006 record is quite comparable to the record Congress compiled in its 1975 reauthorization of section 5. Indeed, by Congress's own reckoning, the 2006 evidence "resembles" not only the legislative record it developed in 1975, but also the 1965 record considered adequate in *Katzenbach*. H.R. REP. NO. 109-478, at 6 (2006). This resemblance is crucial because the Supreme Court has repeatedly described the records at issue in *Katzenbach* and *City of Rome* as more than sufficient. For example, the *City of Boerne* Court found RFRA's legislative record inadequate when compared "to the record which confronted Congress and the Judiciary in the voting rights cases," namely *Katzenbach* and

City of Rome. *City of Boerne*, 521 U.S. at 530. Likewise, in *Florida Prepaid* the Court found that in contrast to the "*undisputed record* of racial discrimination confronting Congress in the voting rights cases, Congress came up with little evidence of infringing conduct on the part of the States." *Fla. Prepaid*, 527 U.S. at 640 (emphasis added) (citation omitted). And in *Garrett*, the Court explained that the "ADA's constitutional shortcomings are apparent" when compared to the Voting Rights Act, for which "Congress documented a marked pattern of unconstitutional action." *Garrett*, 531 U.S. at 373. The contrast between that evidence and the "half a dozen examples" of state discrimination that Congress considered when enacting the ADA was "stark." *Id.* at 369, 374. Given the *City of Boerne* cases' favorable references to the legislative records at issue in *Katzenbach* and *City of Rome*, and the similarity between those records and the record here, the 2006 legislative record is plainly adequate to justify section 5's "strong remedial and preventive measures." *City of Boerne*, 521 U.S. at 526.

Second, the 2006 legislative record is far more powerful than those supporting the only two statutes sustained in the *City of Boerne* cases: the FMLA (*Hibbs*) and ADA Title II (*Lane*). In *Hibbs* the Supreme Court upheld the FMLA's family-care leave provision "based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional state conduct." *Lane*, 541 U.S. at

528. Indeed, the legislative record at issue in *Hibbs* included only the following:

> (1) a Senate Report citation to a Bureau of Labor Statistics survey revealing disparities in private-sector provision of parenting leave to men and women; (2) submissions from two sources at a hearing on the Parental and Medical Leave Act of 1986, a predecessor bill to the FMLA, that public-sector parental leave polices "diffe[r] little" from private-sector policies; (3) evidence that 15 States provided women up to one year of extended maternity leave, while only 4 States provided for similarly extended paternity leave; and (4) a House Report's quotation of a study that found that failure to implement uniform standards for parenting leave would "leav[e] Federal employees open to discretionary and possibly unequal treatment."

Id. at 528-29 n.17 (citation omitted) (summarizing *Hibbs,* 538 U.S. at 728-33). In *Lane* the Court reviewed a slightly stronger legislative record that included "judicial findings of unconstitutional state action" as well as "statistical, legislative, and anecdotal evidence of the widespread exclusion" of the disabled from public services. *Id.* at 529. But in terms of access to courthouses – the central issue in *Lane* – Congress compiled limited evidence, consisting primarily of "testimony from persons with disabilities who described the physical inaccessibility of local courthouses." *Id.* at 527. Thus, in both *Hibbs* and *Lane,* the relevant parts of the legislative records, as

summarized by the Court, consisted of little more than a few reports and limited testimony from a handful of witnesses.

This evidence pales in comparison to the extensive record Congress compiled when extending section 5. During more than twenty hearings, Congress assembled a 15,000-page record that includes numerous studies by voting rights experts, testimony from dozens of witnesses describing racial discrimination in voting by covered jurisdictions, and hundreds of judicial and Attorney General findings of unconstitutional discrimination against minority voters. Indeed, Congress collected evidence of the very kind of intentional discrimination the dissenters in *Hibbs* and *Lane* thought missing in those cases but present in *Katzenbach* and *City of Rome*. Quoting *City of Rome*, one *Hibbs* dissenter noted that whereas the Voting Rights Act's "most sweeping provisions" applied only to states "'with a demonstrable history of intentional racial discrimination in voting,'" Congress failed to show that Nevada itself had been "acting in violation of the Fourteenth Amendment." *Hibbs*, 538 U.S. at 742-43 (Scalia, J., dissenting) (quoting *City of Rome*, 446 U.S. at 177). Similarly, one *Lane* dissenter compared ADA Title II's "nonexistent" record of unconstitutional state action to the "extensive" record of racial discrimination in voting reviewed in *Katzenbach*. *Lane*, 541 U.S. at 547-48 (Rehnquist, C.J., dissenting). That Congress, in considering the 2006 Amendments, developed a record of discrimination more extensive than those found adequate in *Hibbs* and

Lane is all the more significant given that section 5 was actively deterring constitutional violations throughout the period under review. *See supra* pp. 85-87. Had section 5 not existed, Congress presumably would have developed a record dwarfing by even greater margins those supporting the FMLA and ADA Title II.

The District nonetheless argues that the 2006 legislative record, though adequate to support section 2 and other permanent provisions of the Voting Rights Act, is insufficient to justify section 5's "uniquely intrusive" scheme. Pl.'s Mem. at 37. According to the District, *Katzenbach* upheld the preclearance requirement only because certain covered states had devised "extraordinary stratagem[s]" to evade adverse court orders, a finding that justified Congress's decision to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Katzenbach,* 383 U.S. at 328, 335. The District argues that the 2006 extension of section 5 is unconstitutional because the legislative record contains no evidence of such stratagems or "gamesmanship," which the District defines as calculated attempts "to frustrate enforcement of federal voting-rights protections through the improper use of iterative changes in election practices and procedures." Pl.'s Reply in Supp. of Summ. J. at 3 ("Pl.'s Reply"). For three reasons, we disagree.

First, the District misreads *Katzenbach*. Although the Court did emphasize that Congress knew that "some" covered states had "contriv[ed] new rules

of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees," it upheld section 5 even though the record contained no evidence that *all* covered jurisdictions had engaged in such behavior. *Katzenbach,* 383 U.S. at 335. Equally important, the Court never stated that evidence of "extraordinary stratagem[s]" was critical to section 5's constitutionality. The critical factor, the Court repeatedly stressed, was that "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." *Id.* at 328; *see also id.* at 313-15 (explaining why laws facilitating case-by-case litigation had "proved ineffective"). Confirming this interpretation of *Katzenbach,* the Supreme Court in *City of Boerne* explained that "[t]he [Voting Rights Act's] new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws, and the slow, costly character of case-by-case litigation." *City of Boerne,* 521 U.S. at 526 (citations omitted); *see also Garrett,* 531 U.S. at 373 ("In [the Voting Rights] Act . . . Congress also determined that litigation had proved ineffective."). Congress again made this crucial finding when extending section 5, declaring that "failure to reauthorize the temporary provisions, given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action." H.R. REP. NO. 109-478, at 57 (2006). This conclusion flowed from testimony that section 2

litigation (1) cannot prevent enactment of discriminatory voting measures, which remain in effect for years until litigation ends; (2) imposes a heavy financial burden on minority plaintiffs; and (3) places the burden of proof upon plaintiffs rather than upon covered jurisdictions. *See, e.g.*, 1 *Section 5 History* 92, 97, 101 (testimony of Nina Perales); *id.* at 79, 83-84 (testimony of Anita Earls); 1 *Evidence of Continued Need* 97 (testimony of Joe Rogers). The Court relied on similar findings in *Hibbs* and *Lane* to sustain the constitutionality of the statutes at issue in those two cases. *See Lane*, 541 U.S. at 531 ("Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response.'" (alteration in original) (quoting *Hibbs*, 538 U.S. at 737)).

Second, in *City of Rome* the Court found Congress's reauthorization of section 5 constitutional without ever mentioning stratagems, gamesmanship, or anything of the sort. Instead, the Court relied on evidence of racial disparities in registration rates and the number of elected officials, as well as on the number and nature of Attorney General objections. *See supra* pp. 30-31. Moreover, the Court upheld section 5 against a facial challenge without examining any specific evidence – of gamesmanship or anything else – from Texas or other jurisdictions newly covered by the 1975 Amendments.

Finally, even if evidence of contemporary stratagems to evade court orders were necessary, the 2006 legislative record documents just such behavior. For example, as described earlier, Mississippi sought to revive its discriminatory dual registration system after a federal court struck it down; Waller County, Texas, while losing or settling a series of lawsuits, repeatedly sought to block students attending an historically black university from voting; and North Johns, Alabama, first signed a consent decree in which it agreed to abandon its discriminatory at-large system, but later intentionally discriminated against two African American candidates for town council. *See supra* pp. 62-63, 71-73, 75-76. These are hardly examples of "jurisdictions hav[ing] problems getting it right." Pl.'s Reply at 28. Quite to the contrary, these and many similar examples in the legislative record amount to just the kind of "conscious and continuing effort to avoid the [Act's] requirements" that the District insists are necessary to justify section 5's extension. *Id.* At oral argument District counsel contended that gamesmanship involves a series of legislative enactments, not isolated actions by individual officials. Mots. Hr'g Tr. at 33 (Sept. 17, 2007) ("The [North Johns] Mayor's actions at that time were separate, but they were not an independent enactment."). Again, the District misreads *Katzenbach*. There, the Court emphasized that "*certain local officials* have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls." *Katzenbach*, 383 U.S. at 314 (emphasis added).

We have no doubt that 1960s-style gamesmanship is less common today, but that is unsurprising. Section 5 has been deterring voting discrimination since 1965, *see supra* pp. 85-87, and "[d]iscrimination today is more subtle than the visible methods used in 1965," H.R. REP. NO. 109-478, at 57 (2006). Emphasizing the critical role played by section 5, the Attorney General explains:

> Congress adopted the preclearance remedy to remove the opportunity for covered jurisdictions to engage in such gamesmanship. The fact that Congress's chosen remedy has been and continues to be successful supports, rather than undermines, the appropriateness of the remedy. Under [the District]'s view of congruence and proportionality, Congress could not reauthorize a statutory remedy unless it finds that the targeted constitutional problem continues unabated – in other words, only ineffective remedies would be congruent and proportional. That simply cannot be the state of the law.

Def.'s Reply Mem. at 14-15. We agree. The District's gamesmanship argument reduces Congress's Fourteenth and Fifteenth Amendment enforcement authority to a Catch-22. JOSEPH HELLER, CATCH-22, at 55 (Simon & Schuster 2004) (1955) ("If he flew [combat missions] he was crazy and didn't have to; but if he didn't want to he was sane and had to.").

C.

Moving to the third and final step – the congruence and proportionality of the statutory scheme – we start again with what the *City of Boerne* cases say about the Voting Rights Act, this time focusing on its tailored remedial scheme. In *City of Boerne* the Court pointed out that the provisions challenged in *Katzenbach* and *City of Rome* "affected a discrete class of state laws" and were "confined to those regions of the country where voting discrimination had been most flagrant." *City of Boerne,* 521 U.S. at 532-33. It also stressed that the Act was temporary and that covered jurisdictions could seek bailout. *Id.* at 533. These limiting provisions, the Court explained, "tend to ensure Congress' means are proportionate to ends legitimate under § 5." *Id.* By contrast, "RFRA [wa]s not designed to identify and counteract state [actions] likely to be unconstitutional." *Id.* In *Garrett* the Court drew a similar contrast between the ADA's general accommodation duty and the Voting Rights Act's "detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified." *Garrett,* 531 U.S. at 373.

Significantly for our purposes, the limiting features of section 5 the Court believed so compelling in the *City of Boerne* cases all remain in place today. Section 5 still applies for only a limited time, i.e., twenty-five years. Section 5 still targets only those states with the most severe histories of discrimination; in fact, it covers

fewer than one-third of the fifty states. And the statute still includes both bailout and "bail-in" provisions for expanding or contracting coverage over time. Indeed, the Act, as extended in 2006, provides broader eligibility for bailout than the versions upheld in *Katzenbach* and *City of Rome* and commended throughout the *City of Boerne* cases. Under the original 1965 Act, only ninety-one covered states and separately covered political subdivisions could seek bailout; thanks to the 1982 Amendments, today nearly nine hundred entities – including political subdivisions within covered jurisdictions – may do so. Def.'s Statement of Uncontested Material Facts ¶¶ 113-14.

Furthermore, section 3(c)'s bail-in provision continues to serve its intended purpose of ensuring coverage where it is needed. As Congress knew when it passed the 2006 Amendments, two states and several counties have been designated for coverage by court order since *City of Rome*. 1 *Evidence of Continued Need* 154 (report of Nat'l Comm'n on the Voting Rights Act); *see also Continuing Need for Preclearance* 188 (testimony of Pamela S. Karlan). In one of the two statewide cases, a federal district court found that from 1973 to 1989 Arkansas intentionally discriminated against minority voters by enacting "a series of four majority-vote statutes passed to convert to a run-off system those plurality elections in which blacks were succeeding." *Jeffers v. Clinton*, 740 F. Supp. 585, 594, 600 (E.D. Ark. 1990). Finding the "inference of racial motivation . . . inescapable," the

district court directed Arkansas to preclear any majority-vote requirements in general elections "until further order of this Court." *Id.* at 595, 601, 627. After withdrawing its appeal, *Clinton v. Jeffers,* 498 U.S. 1129 (1991), Arkansas complied with the order, seeking preclearance as recently as 2002. *See* U.S. Dep't of Justice, Notice of Preclearance Activity Under the Voting Rights Act of 1965, as Amended (Jan. 18, 2002), *available at* http://www.usdoj.gov/crt/voting/notices/vnote011802.html. In the other statewide case, a three-judge district court found that New Mexico's post-1980 legislative reapportionment violated section 2 and ordered the state to obtain preclearance for any statewide legislative redistricting "for a period of ten years." *Sanchez v. Anaya,* No. 82-0067M ¶ 8 (D.N.M. Dec. 17, 1984) (judgment). Because of that court order, the Attorney General was able to review and then object to New Mexico's 1991 state senate redistricting plan, which the state failed to demonstrate was not motivated by discriminatory intent. 1 *Section 5 History* 1620-21 (Letter from John R. Dunne, Assistant Attorney Gen., DOJ Civil Rights Div., to Manny M. Aragon, N.M. Senate President Pro Tempore, and Raymond G. Sanchez, N.M. House of Representatives Speaker (Dec. 10, 1991)).

Moreover, the 2006 extension is far more tailored than the statutes the Court found congruent and proportional in *Hibbs* and *Lane.* Although the Court praised the "narrowly targeted" and "limited" remedies provided by the FMLA and ADA Title II, *Hibbs,* 538 U.S. at 738; *Lane,* 541 U.S. at 531, those laws are

broader than section 5 in several key respects: both the FMLA and ADA Title II impose obligations nationwide, apply to all public employers or programs, and are permanent. By contrast, section 5 is geographically targeted, temporary, and applies only to *changes* in voting procedures, not to all political or election-related activities in covered jurisdictions. One *Lane* dissenter, pointing out that Title II "applies to any service, program, or activity provided by any entity," observed that "Title II's all-encompassing approach to regulating public services contrasts starkly with the more closely tailored" Voting Rights Act, whose "'limited remedial scheme[s]' . . . were narrowly tailored to address massive evidence of discrimination in voting." *Lane,* 541 U.S. at 550 & n.10 (Rehnquist, C.J., dissenting) (alteration in original) (quoting *Garrett,* 531 U.S. at 373).

The District nonetheless insists that the 2006 extension is insufficiently tailored to survive a *City of Boerne* challenge. First, it argues that the coverage formula is no longer congruent because "[b]oth proxies" – (1) use of a test or device and (2) registration or turnout rates below 50% – are "out of date and cannot indicate which jurisdictions have recently engaged in unconstitutional transgressions." Pl.'s Mem. at 55. The statute's current constitutionality, however, does not turn on the fit between the coverage formula's proxies and conditions existing in covered jurisdictions today. Congress designed the coverage formula to identify jurisdictions with histories of voting discrimination severe enough to justify being subjected

to section 5's preclearance requirement. Once covered, jurisdictions remain so unless they bail out. As *City of Boerne* explains with respect to the Act's original, less generous bailout provision, "to ensure that the reach of the Voting Rights Act was limited to those cases in which constitutional violations were most likely (in order to reduce the possibility of overbreadth), the coverage under the Act would terminate 'at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years.'" *City of Boerne,* 521 U.S. at 533 (quoting *Katzenbach,* 383 U.S. at 331). Moreover, in *City of Rome* the Court sustained the constitutionality of the section 5 extension even though most covered jurisdictions had by then achieved registration rates well in excess of 50%. *See City of Rome,* 446 U.S. at 180 (discussing racial disparities in registration rates, not overall average rates); S. REP. NO. 94-295, at 14 (1975) (revealing that in 1971-72, seven southern states had average registration rates of 68% for whites and 57% for blacks). Under *City of Boerne,* the constitutional question before us turns on whether Congress documented sufficient evidence of contemporary discrimination in covered jurisdictions and designed an appropriately tailored remedy. Congress has easily passed both tests. To be sure, some covered jurisdictions – perhaps even many – no longer discriminate in voting. The way out for such jurisdictions, however, is not a blanket order from this court declaring section 5 unconstitutional, but rather declaratory judgments allowing bailout.

Continuing its assault on the coverage formula, the District next argues that Congress "made no meaningful comparison between previously covered jurisdictions and noncovered ones." Pl.'s Mem. at 54, 56. This is incorrect. The legislative record reveals significant differences between covered and noncovered jurisdictions. In particular, one study found that of the 114 section 2 suits in which plaintiffs prevailed, more than half (64) originated in covered jurisdictions, even though less than one-quarter of the nation's population resided in such jurisdictions. *See Impact and Effectiveness* 974 (report of Ellen Katz). According to the same study, from 1982 to 2005 the success rate of section 2 suits in covered jurisdictions exceeded the success rate of such litigation elsewhere. *Id.* (showing success rates of 41% in covered jurisdictions and 30% in noncovered jurisdictions). Finally, the study reported that courts hearing section 2 suits in covered jurisdictions, compared with their counterparts in noncovered jurisdictions, more often found (1) the use of devices that enhance the opportunity for racial discrimination in voting, (2) racial appeals in campaigns, (3) the failure of minority candidates to win elections, and (4) tenuous justifications given for practices challenged as discriminatory. *Id.* at 998, 1003, 1008, 1013-15. These differences are particularly striking given that but for section 5's prophylactic effects, covered jurisdictions would likely have been targeted by far more section 2 litigation.

Next, the District argues that if jurisdictions like it may not apply for bailout, as we have held in Part

II, "then bailout is an empty promise." Pl.'s Mem. at 58. If only political subdivisions that register voters are able to seek bailout, the District insists, the "concern relating to the remedy's incongruence is magnified exponentially," rendering the "reauthorized § 5 . . . unconstitutionally overbroad." *Id.* at 26. In *City of Rome,* however, the Supreme Court upheld section 5's constitutionality even though the city was ineligible to seek bailout. *See* 446 U.S. at 169, 180. Indeed, one *City of Rome* dissenter took precisely the same position the District does here: "[I]f governments like the city of Rome may not bail out, the statute oversteps [the] limits [of Fifteenth Amendment authority]." *Id.* at 205 (Powell, J., dissenting). To be sure, in *City of Rome* the Supreme Court was applying *Katzenbach's* rationality standard, but we see no basis for reaching a different result under *City of Boerne's* more demanding congruence and proportionality test. After all, in *City of Boerne* the Court emphasized that the Act's bailout mechanism "tend[s] to ensure Congress' means are proportionate to ends legitimate under § 5," *City of Boerne,* 521 U.S. at 533, and as the Attorney General points out, "[t]he current bailout system is significantly less burdensome" than the system sustained in *City of Rome.* Def.'s Opp'n at 27. Specifically, in addition to Texas, Travis County may now seek bailout on the District's behalf.

The District next claims that the amended bailout procedure is "practically unworkable and in effect unachievable" because covered jurisdictions that register voters "must establish that every city, town,

school district, or other entity within [their] boundaries has met the statutory conditions." Pl.'s Mem. at 22. According to the District, for example, Travis County bears the burden of "research[ing] the activities of each and every one of [107] entities [within its boundaries] for the prior ten years." *Id.* at 22-23; *see* Def.'s Statement of Uncontested Material Facts ¶ 29. As the Attorney General points out, however, "Travis County has contracted with all of the 107 political subunits within the county – including [the District] – to conduct elections on their behalf," making it "likely that Travis County would already have at hand much of the information necessary" for bailout. Def.'s Opp'n at 28; Def.'s Statement of Uncontested Material Facts ¶¶ 28-29, 32-33. Moreover, demonstrating the feasibility of bailout, every one of the fourteen jurisdictions to have applied since 1984 has, with the Attorney General's support, succeeded in terminating coverage. Def.'s Opp'n at 29; Def.'s Statement of Uncontested Material Facts ¶ 115. Unimpressed, the District considers it "telling" that all fourteen jurisdictions are from Virginia and that "Virginia uniquely structures its local government so that counties and independent cities do not contain large numbers of smaller governmental units." Pl.'s Mem. at 23 n.5. Yet one of the Virginia jurisdictions that successfully bailed out, Shenandoah County, has nine political subunits, a number almost identical to Texas's median of ten subunits per county. *See* 2 *Section 5 History* 2772; Decl. of Kristen M. Clarke in Supp. of Resp. to Pl.'s Mot. for Summ. J. of Def.-Intervenors Texas NAACP et al. Ex. 4 (data from Texas Secretary of State showing by county all

subunits that conduct elections). More significantly, Congress heard testimony that many jurisdictions believe preclearance to be advantageous and have no desire to seek bailout. *See, e.g., Reauthorizing the Voting Rights Act* 313-14 (statement of Donald M. Wright) (noting that officials in many covered North Carolina counties supported renewal and "viewed Section 5 as a manageable burden providing benefits in excess of costs and time needed for submissions"). This includes intervenor Travis County, which explains in its brief:

> [T]he County sees the Section 5 preclearance process through a very different lens than the District – one polished by experience, not theory. While there is some administrative burden associated with Section 5 compliance, it is minor and not disruptive to the County's business. On the other side of the scale, the County actually receives benefits from the Section 5 preclearance process. The continued existence of the Act's preclearance requirements carries with it valuable educational and deterrent effects that aid Travis County and its lead election officials – the County Clerk and the County Tax Assessor-Collector – in administering their many election-related duties, not just for themselves, but also for the more than one hundred jurisdictions whose elections the County handles and for the voters themselves.
>
> To take only one example, the interface between poll workers and voters, particularly minority voters, is probably the most

> personal interaction between local government officials and the electorate in the democratic process. Yet, as the Travis County Clerk has explained, the process of selecting those poll workers who fan out across the County on election day is highly idiosyncratic, varying from precinct to precinct and electoral unit to electoral unit. Training is an essential component in making the system work in a way that results in an atmosphere of sensitivity and concern for voters rather than an environment of hostility and indifference. The existence of the anti-discrimination principles underlying Section 5 and of the watchful presence of the Department of Justice in the background are beneficial tools, aiding the County in its efforts to train poll workers and others involved in the election process in a way that furthers the principles of openness and fairness to minority voters.
>
> Thus, for the County, the modest administrative costs that come with being subject to Section 5's preclearance requirements are far outweighed by the benefits that come from such coverage.

Travis County's Mot. for Summ. J., with Accompanying Mem. of P. & A. at 6-7. The county concludes: "The day may come when the balance shifts, and Section 5's burdens on conducting local elections outweigh the benefits, but it isn't here yet." *Id.* at 7.

Finally, the District argues that the twenty-five-year extension goes so far beyond the "modest seven-year extension" upheld in *City of Rome* as to have "no end in sight." Pl.'s Mem. at 40, 58. But as we explained earlier, Congress considered and reasonably rejected a shorter extension. *See supra* pp. 91-92. As in 1982, when it also extended section 5 for twenty-five years, Congress believed that the longer extension was necessary to incorporate two decennial redistrictings and to encourage bailout. Given the special deference we owe Congress under the circumstances of this case, we have no basis for questioning this judgment.

D.

For the foregoing reasons, the 2006 extension represents "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Lane,* 541 U.S. at 533. The evidence of unconstitutional state conduct Congress amassed resembles the 1975 legislative record extolled in the *City of Boerne* cases and dwarfs those considered adequate in *Hibbs* and *Lane.* Racial disparities remain in voter participation rates and the number of elected officials, and racial discrimination in voting continues throughout covered jurisdictions – on some measures, at a higher rate than in noncovered jurisdictions despite section 5's deterrent effects. To be sure, the record also reveals that minorities in covered jurisdictions have made significant progress since 1982. But given that this progress is due in no small part to the Voting Rights

Act itself, and given the deference owed Congress when it acts at the zenith of its Fourteenth and Fifteenth Amendment enforcement authority to prevent states from discriminating in voting on the basis of race, we have no basis for overturning Congress's judgment that preclearance – "a vital prophylactic tool[ ]," H.R. REP. NO. 109-478, at 21 (2006) – remains necessary. Moreover, section 5, as extended, is more tailored than the versions sustained in *Katzenbach* and *City of Rome,* and far more tailored than the statutes considered congruent and proportional in *Hibbs* and *Lane*. Of course, Congress could perhaps have made section 5 even more tailored, such as by modifying the coverage formula or further liberalizing bailout. But again, given Congress's broad authority to fashion remedial measures to combat racial discrimination in voting, we decline to second-guess its decision to renew coverage and bailout provisions upheld in *Katzenbach* and *City of Rome* and discussed with approval in the *City of Boerne* cases.

VI.

Having rejected the District's facial challenge to section 5 under both *Katzenbach* and *City of Boerne,* we turn finally to two arguments in the District's amended complaint that could reflect an as-applied challenge.

First, the District asserts that "[t]here has never been any finding that [it] has engaged in discriminatory

voting practices." Am. Compl. ¶ 25. The "sole basis" for its preclearance obligation, according to the District, "is that it was created (in 1987) within a state that was deemed covered by the Voting Rights Act more than thirty years ago." *Id.* The District's brief explains:

> Throughout its two decades of existence, the [D]istrict has held elections in compliance with the Voting Rights Act. When it needed to, the [D]istrict has sought and received preclearance from the Attorney General – who has never interposed an objection to any election change made by the [D]istrict. The [D]istrict has never been subjected to federal election examiners, has never had a judgment entered against it on any election matter, and has never had any voting or election lawsuit filed against it. In its entire history, not a single individual has ever complained about or questioned any voting or election procedure used by the [D]istrict on federal voting rights grounds. In their depositions, not one of the intervenors identified a single complaint about the [D]istrict's elections or the way they are conducted.

Pl.'s Mem. at 1. Given its exemplary record, the District argues, "there is no conceivable rationale to force [it] to continue to wear the badge of shame that is preclearance." *Id.*

The fundamental flaw in this argument is that in *City of Rome* the Supreme Court upheld section 5's application to a jurisdiction that, like the District,

had no record of unconstitutional discrimination in voting. There, as an alternative to its bailout request, Rome advanced an as-applied challenge to section 5 along with its facial claim. *See* Jurisdictional Statement of Appellants at 36, *City of Rome,* 446 U.S. 156 (No. 78-1840) ("This is the first case since 1966 in which the constitutionality of Section 5, both facially and as applied, has been placed squarely before this Court, based upon a record which includes samples of actual experience under this controversial provision."). Emphasizing that the district court had found no evidence of intentional discrimination on its part, *see City of Rome v. United States,* 472 F. Supp. 221, 224-25 (1979), Rome urged the Supreme Court to address section 5's "impact . . . upon a political subdivision which is found to be innocent of any discriminatory purpose," Brief for the Appellants at 19, *City of Rome,* 446 U.S. 156 (No. 78-1840). In sustaining section 5's constitutionality, however, the Court paid no heed to Rome's record of constitutional compliance, instead focusing entirely on the legislative record documenting racial discrimination in voting throughout the covered states. *See City of Rome,* 446 U.S. at 173-83. Indeed, one dissenter took precisely the same position the District does here, accusing the majority of "ignor[ing] the most relevant facts" and "avert[ing] its eyes from the central paradox of this case: Even though Rome has met every criterion established by the Voting Rights Act for protecting the political rights of minorities, the Court holds that the city must remain subject to preclearance." *Id.* at 196 n.4 (Powell, J., dissenting). According to that dissent, the

Court's rejection of Rome's bailout request rendered the Act "unconstitutional as applied to the city of Rome." *Id.* at 200.

Given the dissenter's position and the majority's silence as to Rome's record, we think it fair to read *City of Rome* as holding that where, as here, Congress has compiled a sufficient legislative record to defeat a facial constitutional challenge, *see supra* Part IV, an as-applied challenge based on a political subunit's record of nondiscrimination must also fail. *See also Lopez,* 525 U.S. at 282-87 (upholding application of section 5 to covered county's efforts to implement voting change required by noncovered state while conducting no examination of county's or state's records of discrimination); *Mitchell,* 400 U.S. at 216 (Harlan, J., concurring in part and dissenting in part) (upholding application of nationwide literacy test ban because "[d]espite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application"); *id.* at 284 (Stewart, J., concurring in part and dissenting in part) ("Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union, Congress was not required to make state-by-state findings. . . . "). This principle is consistent with cases rejecting as-applied challenges in other contexts. *See, e.g., United States v. Edge Broad. Co.,*

509 U.S. 418, 430-32 (1993) (discussing as-applied First Amendment cases in which the Court "judge[d] the validity of the restriction . . . by the relation it bears to the general problem . . . , not by the extent to which it furthers the Government's interest in an individual case"); *United States v. Blaine County,* 363 F.3d 897, 904-09 (9th Cir. 2004) (rejecting county's as-applied challenge to section 2 of the Voting Rights Act, *see* Appellants' Opening Brief at 12, *Blaine County,* 363 F.3d 897 (No. 02-35691), by upholding the provision as facially valid under *City of Boerne*). And we believe this principle applies here even if *City of Boerne* provides the proper test for evaluating the statute's facial validity. Given that the Voting Rights Act's coverage is congruent and proportional, *see supra* Part V, the unique circumstances of a particular political subunit, like the District, cannot provide grounds for an as-applied constitutional challenge.

This conclusion finds support not only in precedent, but also in logic. As NAACP intervenors explain: "Congress is a national legislative body. Its assessments of problems to be remedied and the measures necessary to remedy the problems are typically multi-jurisdictional, if not nationwide." NAACP Mem. at 79-80. "If the District's claim were accepted," their brief continues, "it would require Congress to determine the appropriateness of Section 5's coverage of every single state, county, city, village, utility district, special purpose district, or any other entity that holds elections." *Id.* at 80. The District's position would also open the door to as-applied challenges by thousands

of entities that conduct elections within covered jurisdictions, upsetting the balance Congress struck when it expanded bailout eligibility in 1982. Unsurprisingly, such an approach finds no support in cases addressing claims that Congress exceeded its enumerated powers. *See supra* Parts IIIA and IIIB.

As an aside, we think it worth noting that the District's as-applied challenge would also fail under a different approach proposed by two justices – an approach that would entertain as-applied challenges by evaluating the records of covered jurisdictions, not their political subunits. Responding to the dissenters in *City of Rome,* Justice Stevens explained in a concurrence that "[i]f racially discriminatory voting practices elsewhere *in the State of Georgia* were sufficiently pervasive to justify the *statewide remedy* Congress prescribed, that remedy may be applied to each and every political unit within the State." *City of Rome,* 446 U.S. at 190 (Stevens, J., concurring) (emphasis added). Similarly, dissenting in *Hibbs,* Justice Scalia argued that courts evaluating as-applied challenges to enforcement legislation should "examin[e] whether *the State has itself* engaged in discrimination sufficient to support the exercise of Congress's prophylactic power." *Hibbs,* 538 U.S. at 743 (Scalia, J., dissenting) (emphasis added). Under this state-by-state approach, the District's as-applied challenge would fail because as we explained throughout Part IV, the 2006 legislative record is replete with evidence of contemporary racial discrimination in voting by Texas and its political subunits. For example,

the record reveals not only a substantial gap in registration rates between whites and Hispanics, but also that since 1982 Texas led all covered jurisdictions in the number of MIR-induced outcomes, judicial preclearance suits resolved favorably to minorities, and successful section 5 enforcement suits. *See supra* pp. 48-49, 66-67, 71. In fact, despite having been covered only since 1975, Texas received more objections during the entire 1966-2004 period than did any other covered state. *See supra* p. 54. The record also contains telling examples of intentional discrimination by the Texas cities of Prairie View, Seguin, Dallas, Midland, and Terrell, as well as by Texas itself through the statewide redistricting plan partially invalidated in *LULAC*. *See supra* pp. 71-73, 79-80.

The District's second argument in support of an as-applied challenge focuses on the burden that section 5 allegedly imposes upon it. Specifically, the District asserts that section 5 "hinders the right of voters in the [D]istrict to decide the manner in which their representation at the local level will be determined – that is, to alter the manner and procedures by which their representatives in the [D]istrict are elected – because of the burden of the preclearance procedures." Am. Compl. ¶ 25. According to the District, "even the most minute . . . changes" – such as "a plan to move a polling place across the street from a church to a school" – require preclearance, imposing "the burden of preparing and submitting the request" and "presumptively delay[ing most changes] by at

least 60 days [pending] the Attorney General's approval." *Id.* ¶ 12. Even though "the Attorney General almost never objects to proposed changes in local voting practices or procedures," the District argues, "the process itself imposes a substantial burden." *Id.* ¶ 13.

This argument fails essentially for the same reason as the District's first argument. In extending section 5, Congress determined, pursuant to its authority under section 2 of the Fifteenth Amendment, that eradicating racial discrimination in voting justifies any burden preclearance might impose on covered jurisdictions and their political subunits. Because section 5's extension was facially constitutional, *see supra* Part IV, that same burden, whatever its magnitude, cannot now provide the basis for an as-applied challenge. Again, this is the teaching of *City of Rome*. Like the District here, Rome contended that "[t]he practical operation of section 5 supports the conclusion that it is now unconstitutional" because "the procedures prescribed by Congress for obtaining preclearance of the electoral changes in a covered jurisdiction have proven intrusive and burdensome." Brief for the Appellants at 79, *City of Rome*, 446 U.S. 156 (No. 78-1840). Detailing the costs of its declaratory judgment action, Rome argued that "[a]lthough this burden would be substantial to any unit of government forced to shoulder it, it is even more serious to a city the size of Rome." *Id.* at 80 n.71. Yet the Court rejected the city's constitutional

challenge without even mentioning the burden section 5 imposed on Rome, *see City of Rome,* 446 U.S. at 173-83, doing so over a vigorous dissent that emphasized "the burden of preclearance on Rome" and condemned the majority's "decree[ ] that the citizens of Rome will not have direct control over their city's voting practices until the entire State of Georgia can free itself from the Act's restrictions," *id.* at 200, 203 (Powell, J., dissenting). Obviously, the Court rebuffed Rome's burden argument for the same reason it rejected its innocence claim: because Congress had compiled a sufficient legislative record to defeat a facial constitutional challenge to section 5, an as-applied challenge based on Rome's particular circumstances necessarily failed. We again see no reason to reach a different result if *City of Boerne* provides the proper test for evaluating section 5's constitutionality. Once section 5 has been found facially constitutional under whatever standard – *Katzenbach* or *City of Boerne* – we fail to see how a constitutionally covered jurisdiction's particular circumstances could possibly support an as-applied challenge.

In any event, even assuming the burden section 5 imposes on covered jurisdictions is relevant under *City of Boerne's* congruence and proportionality standard, the District's burden is trivial. Throughout its two decades of existence, the District has filed only eight preclearance requests, Def.'s Statement of Uncontested Material Facts ¶¶ 71-78, 93, and the cost of these submissions – $223 per year – is modest, especially when compared to the District's average

annual budget of $548,338, *id.* ¶¶ 98-99. As the Attorney General points out, moreover, the District has never received an objection letter or been targeted by a section 5 enforcement suit. *Id.* ¶¶ 71-78, 89. Nor has the District identified a single voting change that it considered but chose not to pursue because of section 5. *Id.* ¶ 88. Finally, given that state law controls most features of the District's electoral system, it has limited autonomy to adopt voting changes in the first place. *Id.* ¶¶ 53-70, 90. 120-24. In light of this evidence – all uncontested by the District – we find it impossible to conclude that section 5 imposes any meaningful burden on the District, much less an unconstitutional one.

VII.

Because the District does not qualify as a "political subdivision" as defined in section 14(c)(2) of the Voting Rights Act, it is ineligible to request a declaratory judgment exempting it from section 5's preclearance requirement. The District's constitutional challenge fails because Congress, acting pursuant to section 2 of the Fifteenth Amendment, rationally concluded that extending section 5 was necessary to protect minorities from continued racial discrimination in voting. Alternatively, under the *City of Boerne* standard, the 2006 Amendment qualifies as a congruent and proportional response to the continuing problem of racial discrimination in voting that Congress sought to remedy.

Consistent with this opinion, an order denying the District's motion for summary judgment and granting the Attorney General's and intervenors' motions for summary judgment is issued this same day.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

/s/ Emmet G. Sullivan
EMMET G. SULLIVAN
United States District Judge

/s/ David S. Tatel
DAVID S. TATEL
United States Circuit Judge

DATE: May 30, 2008

APPENDIX

Examples of Objection Letters Based on Discriminatory or Retrogressive Intent, 1982-2005

ALABAMA

- Tallapoosa County (Feb. 6, 1998), 1 *Section 5 History* 429-34.

  Noting a "history of noncompliance [with voting rights laws] on the part of the county," the Justice Department objected to a plan revising district lines and reducing the number of county commissioners from six to five. According to 1990 census data, African Americans constituted 26 percent of the county's total population and 23 percent of the voting-age population. To settle a section 2 suit, the county agreed in a consent decree to adopt by 1998 "a fairly apportioned five-member plan with one district with a majority black voting age population." After a white commissioner announced that he no longer planned to step down in 1998, the commission voted along racial lines to approve a plan that violated the consent decree by creating one district with a black voting-age population of only 49 percent. At first, the county refused to submit the plan for preclearance, but then did so after amending it "apparently in order to achieve a marginal majority in black voting age population" in the relevant district. Compared to the existing plan, "the proposed plan reduce[d] the black voting age population in the majority

black district by at least 10.7 percentage points" and was "very similar . . . to the 'minority' district . . . in effect in 1990 in which the candidate of choice of minority voters lost the election by a significant margin." The Justice Department concluded: "Taken together, the history of the instant redistricting process and its results raise serious concerns that the county . . . purposefully impaired the ability of black voters to elect a candidate of choice in order to protect the reelection opportunities of a white incumbent."

- City of Greensboro (Jan. 3, 1994), 1 *Section 5 History* 412-14.

  According to the 1990 Census, black residents constituted 62 percent of the total population and 56 percent of the voting-age population in Greensboro. After objecting to a 1992 districting plan that "appeared unnecessarily to limit black voters to an opportunity to elect only two of the five councilmembers," the Justice Department again objected to a 1993 plan that made only "minimal changes to the objected-to plan." The letter explains: "With regard to District 2, which had been the focus of our concern, the 1993 plan adds one block to the district and removes another block from the district. While the plan provides for slight increases in the black population percentages in District 2, the opportunity for black voters to elect a representative of their choice in that district appears to have been constrained deliberately, taking into account the continued

fragmentation of black population concentrations, the pattern of racially polarized voting and the reduced electoral participation by black persons, which is traceable to a history of discrimination." Although "aware of several alternative plans" to create a third district with a larger proportion of black voters than the proposed District 2, the city "provided no satisfactory explanation" for rejecting the alternative plans and was "not free to adopt a districting plan which, as would appear here, is calculated to limit black voting strength."

CALIFORNIA

- Monterey County (Mar. 29, 2002), 2 *Section 5 History* 3319-22; *see also* 1 *Evidence of Continued Need* 351.

  The county's Chualar Union Elementary School District proposed changing from districts to an at-large system for electing trustees. According to the 2000 Census, the school district's population was 78 percent Hispanic, while the voting-age population was 74 percent Hispanic. Under the existing system, Hispanic voters in a single district – Area 3, where the Hispanic population exceeded 90 percent – elected three of the school district's five trustees. The proposed change to at-large elections resulted from a petition drive and referendum. The letter explains:

  > [T]he actions of the trustees elected from Area 3 . . . regarding the tenure of the district's superintendent

of schools provided the impetus for the petition drive. The cover letter . . . attacked the credibility of the trustees from [Area 3], citing the language skills of one trustee and making unfavorable references to the language preferences of another. The language and tone of the letter raises the implication that the petition drive and resulting change was motivated, at least in part, by a discriminatory animus. This conclusion is further supported by statements made by proponents of the petition during our investigation.

Moreover, the petition focused on the actions of the persons elected by the Hispanic community in Area 3. However, over 90 percent of the persons signing the petition did not reside in that district. Rather, they were residents of Area 1, virtually all of whom were not Spanish-surnamed persons.

There is also evidence that the change will, in fact, have a retrogressive effect. Under the at-large system [in effect before 1995], Hispanic voters have had only mixed success, and have faced consistent efforts – sometimes successful – to recall the candidates they have elected. Since the implementation of district elections, Hispanic voters

have been able to elect candidates of choice.

GEORGIA

- City of Albany (Sept. 23, 2002), 1 *Section 5 History* 845-48; *see also* H.R. Rep. No. 109-478, at 37-38 (2006); *Continuing Need for Preclearance* 80.

  According to census data, the city's black population increased from 48 percent in 1980 to 65 percent in 2000, when blacks also represented 60 percent of the voting-age population. The city's 2001 redistricting plan proposed to reduce the black population in one district, Ward 4, from nearly 51 percent to 31 percent. This proposal resembled the city's 1991 redistricting, which reduced Ward 4's black population from 40 percent to 30 percent. Noting that "one of the city's explicit redistricting criteria was to 'maintain ethnic ratios (four majority black districts),'" the Justice Department found that "implicit in that criterion is an intent to limit black political strength in the city to no more than four districts, even though Ward 4 had become majority black and demographic trends indicate that its [black majority] will continue to increase." The letter concludes:

  > Our review of the benchmark and proposed plans, as well as alternative plans considered by the city, indicates that the reduction in the black population percentage in Ward 4 was neither inevitable nor required by

> any constitutional or legal imperative. Alternative redistricting approaches available to the city avoided reducing black voting strength in Ward 4 below the benchmark plan levels, while adhering substantially to the city's redistricting criteria as described in your submission. These facts indicate that the city has fallen short of demonstrating that the change in Ward 4 was not motivated by an intent to retrogress.

- Webster County (Jan. 11, 2000), 1 *Section 5 History* 830-33.

  A redistricting plan for the county board of education proposed to reduce the black population in three of the board's five single-member districts. In one district, the total black population would fall from 66 to 57 percent (and to 46 percent of the voting-age population). In another, the total black population would decrease from 56 to 52 percent (and to 42 percent of voting-age adults). Such reductions, according to the objection letter, "raise serious doubt whether minorities would continue to have an equal opportunity to elect candidates of choice in either district." Regarding intent, the letter finds:

  > The process of developing a new redistricting plan was initiated after the school district elected a majority black school board for the first time

> in 1996. We have been advised that black school board members were told that the districts had to be re-apportioned and that keeping the existing districts was not an option. However, we have examined each of the reasons asserted by the school district for adopting a new redistricting plan and they appear to be merely pretexts for intentionally decreasing the opportunity of minority voters to participate in the electoral process.

LOUISIANA

- Town of Delhi (Apr. 25, 2005), *available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_042505.htm; *see also* 2 *Evidence of Continued Need* 1612, 1654; 1 *Section 5 History* 158; *Voting Rights Act: The Judicial Evolution of the Retrogression Standard, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 16-17 n.1 (Nov. 9, 2005).

  > The town's 2003 redistricting plan would reduce the black voting-age population in Ward B – one of five wards – "by 10.5 percentage points to only 37.9%." The Justice Department found that the proposed plan "eliminates one of the four wards in which minorities . . . have the ability to exercise the franchise effectively." Moreover, "[t]he loss of this district was not necessary" because "[t]he town rejected a less-retrogressive alternative

. . . presented to it during its initial redistricting considerations." As to intent, the Justice Department concluded that "the totality of the circumstantial evidence suggests the town intentionally sought the result we anticipate from the proposed plan." The letter explains:

> The city's black population has consistently and significantly increased over the past three decades, and the increase is expected to continue. There are now four wards under the benchmark plan in which black persons are a majority of the registered voters, yet the town persists in its efforts to maintain a plan with only three such districts.
>
> The drop in black voting strength in Ward B was not driven by any constitutional or statistical necessity. The town has made no claim that the reduction of the black population in this ward[] was necessary, nor has the town offered any justification for its actions, other than to say that the plan is legal because it is within the constitutional standard for population deviation, and was adopted by a majority of the board. . . .
>
> Moreover, the demographer hired by the town to prepare and submit its redistricting plan has told

> the board that the proposed plan does not best satisfy the redistricting criteria and retrogresses minority voting strength. Nevertheless, the town has twice adopted plans that are contrary to that guidance. The town has offered no legitimate reasons for adopting such plans. . . .

- City of Ville Platte (June 4, 2004), *available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_060404.html; *see also* 2 *Evidence of Continued Need* 1612, 1654; 1 *Section 5 History* 158; *Impact and Effectiveness* 1421.

> According to census data, the city's black population "increased both consistently and considerably" over recent decades: in 1980 blacks constituted less than a third of the population, but by 2000 blacks represented 57% of the population and 48% of voting-age adults. In one of the city council's six districts, District F, a similar increase occurred, as the black population grew from 29% in 1997 to 55% in 2000. Voter registration data indicated that "black persons currently appear to constitute a majority of the voting age population" in District F, but the city's "proposed 2003 redistricting plan eliminates [District F's] black population majority by reducing it to 38.1%," a drop of "17 points." According to the Justice Department, "[u]nder such a reduction and within the context of the racially polarized elections that occur in the city, black voters will have lost the electoral ability they currently possess."

The objection letter finds that "the evidence precludes a determination that the proposed plan was not adopted, at least in part, to effectuate this proscribed [retrogressive] effect." The letter "turn[s] first to the city's past redistricting efforts, particularly those in 1993 and 1995," during which "the Attorney General determined that the city failed to establish that, under an analogous set of facts, those efforts were not motivated, at least in part, by a discriminatory purpose." The letter continues:

> Second, despite the existence under the benchmark plan of four districts in which black persons were a majority, the city sought a redistricting plan, "which would consist of three majority-minority districts, and three majority districts." Letter of April 2, 2004, at 1. The city has provided no evidence to rebut the conclusion that use of such a criterion under these circumstances was designed, at least in part, to retrogress minority voting strength. . . .
>
> Third, the precipitous drop in black voting strength in District F was not driven by any constitutional or statistical necessity. The district required, at the most, only minimal adjustments. However, the city undertook wholesale changes, swapping white neighborhoods for black neighborhoods, and moving black

> population from District F into District B, a district which was already 78.8 percent black.
>
> The city claims that the reduction in District F was necessary to retain the electoral ability of black voters in District B. Contrary to the city's assertion, however, a plan that retains benchmark levels of minority voting strength while following most of the city's criteria, was possible. . . . Thus, the retrogression that results from the plan was avoidable.

MISSISSIPPI

- City of Grenada (Aug. 17, 1998), 1 *Section 5 History* 1606-12.

  Reviewing three voting changes – a 1993 annexation, the cancellation of a 1996 election, and a 1997 redistricting plan – the Justice Department found "substantial direct and circumstantial evidence of discriminatory purpose." Census data indicated that the city's population had declined during the 1980s and 1990s, "with the white population decreasing significantly faster than the black population." A "special census commissioned by the City" in May 1997 revealed that blacks had became a majority, constituting 54% of the population. As for the annexation, when a consultant hired by the city in the 1980s recommended annexation of a parcel whose population was 70% black, the city "took no action and let the . . . issue lie dormant for

several years" – reportedly "because [the consultant] proposed to annex this majority-black area first." In 1992 the city council again considered annexation "after a black candidate made a strong showing in a race for the Ward 4 council seat." And "this time the City's new consultant" proposed a "large, one-time annexation" that would "almost quintuple[ ]" Grenada's geographic area and "change[ ] the City from majority black . . . to majority white . . . , while leaving black voters outside the City." Black city council members voted for the annexation, but withdrew their support upon being provided with racial demographic data *after* the vote. Meanwhile, the proposed redistricting "would reduce the number of wards in which black persons constitute a majority [from four] to three," while also reducing the black proportion in one district from 77% to 63% and in Ward 4 from 56% to 35%. The Justice Department found that these reductions "appear to be significant" given the degree of racially polarized voting and the fact that in "several recent elections . . . the candidate or position strongly favored by black voters lost in Ward 4 by narrow margins." Moreover, the Department concluded that these reductions "were not necessary" given the existence of an alternative plan that "was precluded . . . from even [being] plac[ed] . . . on the agenda by a vote of the four white city council members." Finally, it found that the impact of the canceled election appeared to fall "more heavily on black voters than on white voters"

because "a black candidate had qualified to run against the white incumbent in Ward 4, and . . . was generally thought to have a reasonable chance of winning." As was the case in the annexation process, the Justice Department found that "the sequence of events leading to the cancellation of the 1996 election and the adoption of the redistricting plan, and the numerous procedural and substantive departures from a normal, neutral legislative process . . . establish a pattern of alternating action and inaction, indicative of a purpose to maintain and strengthen white control of a City on the verge of becoming majority black."

- City of Greenville (Nov. 17, 1995), 1 *Section 5 History* 1516-21.

  Under a preexisting plan, the city utilized a "4-2-1" system for council elections: four members represented single-member districts; two represented superdistricts "created by pairing two of the four single-member districts"; and the mayor, who votes only to break ties, was elected at large. In 1991 the city proposed a "least change" redistricting plan that made only minor alterations even though (1) the 1990 Census revealed that the black population had increased from 54% to 59% and (2) under the existing plan "black candidates of choice [had been] defeated in all contests" but two. Reviewing the submission, the Justice Department took "into account the [city's] long history of discrimination in voting," its "six

years of resistance to any resolution of [a] vote dilution case," and "its subsequent refusal to consider any . . . plans for settlement" other than one "essentially identical" to the one proposed. As to intent, the Department also considered the sequence of events leading to the 1991 plan, including:

> a) the results of the 1990 elections indicated that Superdistrict 6 indeed did not provide black voters with an equal opportunity to elect a . . . candidate of choice; b) the apparent decision by white city councilmembers from the outset . . . to limit the scope of the changes that would be undertaken in redistricting; c) the refusal by the [council] to consider alternative redistricting plans advocated by members of the black community that would have alleviated the packing and fragmentation of the black population among the council districts; and d) the apparent disregard for the serious concerns expressed by members of the black community concerning the city's "least change" approach to redistricting (including the fact that several white councilmembers walked out of a public meeting where such concerns were being expressed).

The Justice Department concluded that the proposed plan "served to minimize minority

electoral opportunity" and that "city officials had ignored the concerns of the minority community regarding the plan's impact largely because of, not merely in spite of, the dilutive effect the plan would have." In sum, the plan "appeared to have been motivated by a desire on the part of white city councilmembers to retain white control of the city's governing body."

NORTH CAROLINA

- Bladen County (Nov. 2, 1987), 2 *Section 5 History* 1760-63.

  The county proposed that the electoral system for the board of commissioners change from at-large elections to three double-member districts and one at-large position. Because under the previous at-large system "only one black ha [d] been elected in modern times, despite numerous black candidacies," the Justice Department concluded that the change "will not have a retrogressive effect." It was nonetheless "unable to conclude . . . that the county . . . satisfied its burden that the proposed election system [wa]s free from discriminatory intent." Following "a substantial effort by the black community," the county appointed "leading white and black citizens" to a study committee that "recommended a compromise system of five single-member districts (two of which would be majority black) and one at-large." Although it preferred to have five single-member districts, the "black community indicated that it

would support such a plan." The letter continues:

> While it became clear that some change in the election method would be mandated, it appears that the responsible public officials desired to adopt a plan which would maintain white political control to the maximum extent possible and thereby minimize the opportunity for effective political participation by black citizens. Thus, the board rejected the recommendation of its redistricting committee and representatives of the black community, and instead adopted a plan under which blacks would appear to be limited to an opportunity to elect two of the seven members of the board. The board's membership would be increased by two though we have been advised of no reason for expanding the size of the board independent of the change in method of election. In addition, after the black community opposed the local bill which would have adopted the proposed election system and the bill was dropped from consideration, the change was then adopted pursuant to a transfer of authority which constitutes a significant deviation from the normal procedure. . . . [N]either the increase in the size of a governing body nor the empowering of a local board to

> adopt a new election plan is *per se* unlawful but, in the circumstances present here, it appears that the board undertook extraordinary measures to adopt an election plan which minimizes minority voting strength.

- Wilson County (Mar. 10, 1986), 2 *Section 5 History* 1730-32.

  Following a district court ruling that the county's "existing at-large election structure denies black citizens an opportunity equal to that afforded white citizens to participate in the political process," the county proposed a plan creating two multimember districts. Although the Justice Department found that the proposal "will enhance the opportunity for effective black political participation," it could not "conclude . . . that the proposed method of election was adopted without a discriminatory purpose." Under the plan, "[o]ne district would elect five members and is about 76 percent white . . . ; the other district would elect two members and is about 67 percent black." Moreover, according to the letter, "[t]he proposed five-member district is geographically large and essentially retains features of the at-large election system" previously found to violate section 2:

  > In particular, in light of the . . . court finding that there is "a substantial degree of racial polarization in Wilson County elections," black

> voters likely will have little, if any, chance of electing a representative of their choice in the five-member district. This is significant because nearly half of the county's black population has been placed in this district, while a relatively insignificant portion of the county's white population has been placed in the majority black district. . . . [T]he material submitted concerning the county commissioners' deliberations shows that they were well aware of these limiting aspects of the submitted plan and supports an inference that the plan was designed and intended to limit the number of commissioners black voters would be able to elect.

SOUTH CAROLINA

- Charleston County (Feb. 26, 2004), *available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_022604.html; *see also* H.R. Rep. No. 109-478, at 39-40 (2006); 1 *Evidence of Continued Need* 25.

  The county enacted legislation changing the method of election for school board trustees from nonpartisan to partisan elections even though a federal court had ruled that an identical system for county council elections violated section 2. The Justice Department viewed the change as retrogressive because it "would significantly impair the present

ability of minority voters to elect candidates of choice." Moreover, "it was enacted despite the existence of a nonretrogressive alternative." According to the Department, "[t]he proposed change would likely eliminate the possibility of plurality victories by requiring head-to-head contests with the winner needing a majority of votes." The letter explains:

> [B]ecause Charleston school board elections are non-partisan, they can result in numerous candidates running, thus creating the opportunity for single-shot voting and a plurality win by minority-preferred candidates despite the at-large method of election and the prevalence of racially polarized voting. The proposed change will impose a de facto majority-vote requirement that will make it extremely difficult for minority-preferred candidates to win.
>
> Another significant factor in our determination is the lack of support for the proposed change from minority-preferred elected officials. Our investigation reveals that every black member of the Charleston County delegation voted against the proposed change, some specifically citing the retrogressive nature of the change. . . . [T]he retrogressive nature of this change is not only recognized by black members of the delegation, but is recognized by

> other citizens in Charleston County, both elected and unelected.
>
> . . . The governmental interest in implementing partisan elections can be achieved by non-retrogressive means. A switch to partisan elections would not represent a retrogression of minority voting strength if accompanied by a concomitant shift from at-large elections to a fairly drawn single-member districting plan. Indeed, such a non-retrogressive alternative was considered and adopted by the State Senate, but was not taken up by the State House.

- Town of North (Sept. 16, 2003), *available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_091603.html; *see also* 152 CONG. REC. S7749 (daily ed. July 18, 2006) (statement of Sen. Leahy).

> The town proposed two annexations that would add white persons of voting age to its population. Following a MIR, the town "fail[ed] to respond completely" by refusing to provide information "routinely provided in submissions." Moreover, "some current and former town officials . . . declined to speak" with Justice Department officials. In the end, the Department objected because "information . . . indicate[d] that the Town of North ha[d] been racially selective in its response to both

formal and informal annexation requests." The letter explains:

> [W]hite petitioners have no difficulty in annexing their property to the town. In fact, they received help and assistance from town officials. In contrast, there is evidence suggesting that town officials provide little, if any, information or assistance to black petitioners and often fail to respond to their requests, whether formal or informal, with the result that the annexation efforts of black persons fail.
>
> The town has made no effort to rebut this evidence nor has it articulated any explanation for failing to provide the same treatment to black and white persons who make formal and informal annexation requests. The town contends it has no formal record of annexation requests made by black persons. However, . . . credible evidence . . . revealed the existence of at least one petition for annexation by black persons in the past. The petition was submitted to the town in the early 1990s and included a large number of black persons seeking annexation who reside to the southeast of the town's current boundary. Further, it appears that the granting of this one petition would have resulted in black persons

becoming a majority of the town's population. The town has offered no reason why this annexation petition and possibly other requests brought by minorities would be denied or ignored.

Nor has the town provided equal access to the annexation process for white and black persons. The evidence we have gathered suggests that the town has not disseminated information on the annexation process to black persons and has not established a procedure[] by which black applicants can learn the status of their annexation request. As it appears that annexation petitions brought by minorities have been denied while those brought by white persons have been accepted, in the absence of clearly defined procedures, race appears to be an overriding factor in how the town responds to annexation requests.

TEXAS

- City of Webster (Mar. 17, 1997), 2 *Section 5 History* 2489-93.

  According to the 1990 Census, the city's population was 19% Hispanic and 5% black, while the voting-age population was 17% Hispanic and 4% black. The city proposed an annexation that would add more than one thousand citizens to the population, "all of

whom appear to be white," and thereby decrease the proportion of minority citizens. Regarding intent, the following facts "weigh[ed] heavily" in the Justice Department's assessment of whether the city had met its burden:

> (1) the city failed to annex an area with a significant minority population, while it was simultaneously annexing an all-white area . . . ; (2) the city deviated from what appears to be its primary annexation consideration in deciding not to annex [the black area] (*i.e.*, that the cost of providing municipal services not be outweighed by the revenues anticipated from the annexation); (3) the city failed to achieve its purported objective of establishing an easily distinguishable boundary in the north [with annexation of the white area, whereas t]his objective would have been more fully realized . . . had [the black area] been annexed; and (4) the city in the decision-making process appears to have been apprised by representatives of the minority community of their concerns about excluding from the city the population that resides in [the black area], but . . . voted in favor of annexing only the all-white area.

Moreover, evidence suggested "that the city's agent in determining which areas were eligible for annexation . . . refused to consider [the black area] for annexation because of the racial/ethnic background of the persons who reside [there]." As a consequence, the Justice Department concluded that "significant questions persist regarding a lack of even-handedness in the city's application of its annexation policy and the city's annexation choices appear to have been tainted, if only in part, by an invidious racial purpose."

- Marion County (Apr. 18, 1994), 2 *Section 5 History* 2427-29.

  The county proposed moving a polling place from a community center to a fire department building. According to the 1990 Census, the county's population was 31% black, while the voting-age population was 28% black. Four of the five county commissioners were elected from single-member districts. Only one of these-District 3-was majority-minority, with a black population of 62%. The polling place in question served "one of two black-majority precincts located in District 3," and its location "ha[d] divided the county along racial lines for some years." Black voters generally supported placing the polling place in the western part of the district, and District 3's first black commissioner, elected in 1988, successfully moved the polling place from a temporary building to the community center in 1991. But "[a]fter his defeat by a white candidate [the next

year], in an election that appears to have been characterized by racially polarized voting, the proposed polling place change was initiated." The county commission made this decision "without any meaningful input from the black community regarding the possible effects of the proposed change.". According to the letter, the community center "is located in a heavily black portion of the precinct"; the fire department building, by contrast, "is one to two miles away in a heavily white portion of the precinct." And "[i]n a county with limited public transportation," the Justice Department found, "this proposed location would appear to make it more difficult for black voters to exercise their right to vote." Although the county claimed that the move "was motivated by concerns of voter safety at the community center," the Department found that "there have been no incidents identified warranting this concern." Moreover, "citizens in the county, both black and white, regularly use the community center for activities not related to voting apparently without similar safety concerns." Finally, "other options to ensure voter safety would appear to be available." The Department thus found that "the county's proffered explanation for the polling place change appears to be pretextual, as the change appears to be designed, in part, to thwart recent black political participation."

VIRGINIA

- Pittsylvania County (Apr. 29, 2002), 2 *Section 5 History* 2588-91.

  After the 2000 Census, which showed that the county's population was 24% black, officials proposed a redistricting plan for the board of supervisors and the school board. Under the existing plan, the county had one majority-minority district in which blacks constituted 51% of the population and 50% of voting-age residents. According to the Justice Department, "[s]ince 1991 black voters have had the ability to elect their candidate of choice in this district." The county's proposed plan, however, would reduce the district's black population below a majority. Although the proposed reduction is "relatively small," the Justice Department determined that "a variety of factors preclude the county from establishing . . . that the adoption of this plan is free from either discriminatory effect or purpose." The Department found the change to be retrogressive because "analysis of county elections shows that the level of racial polarization is extreme, such that any reduction whatsoever would call into question the continued ability of black voters to elect their candidate of choice." Moreover, the Department emphasized "the availability of easily constructed alternative plans that not only are non-retrogressive and meet other traditionally recognized redistricting principles, but are ameliorative, in that they increase the voting strength of minority voters"

in the district. Regarding intent, "[s]everal factors establish that the county falls short of demonstrating the lack of retrogressive purpose." And "[c]hief among these," the letter explains, are the following:

> (1) it appears that the Board procedurally blocked formal consideration of alternative, ameliorative plans supported by at least one council member and members of the black community; (2) the county was aware of easily drafted, non-retrogressive and ameliorative alternatives, most of which were in fact similar to the county's own preferred plan; and (3) the apparently pretextual nature of the reasons given by the county for its decision to adopt the plan rather than a non-retrogressive alternative.

- Dinwiddie County (Oct. 27, 1999), 2 *Section 5 History* 2579-83; *see also* 1 *Evidence of Continued Need* 65.

  The county proposed moving a polling place in its Darvills Precinct, a "heavily rural [area], containing no incorporated towns or public schools." Until 1998 the polling place was a community center "located on the western edge of the precinct" and "not commonly utilized by black persons." After fire destroyed the center, the county electoral board moved the polling place to "a privately owned hunting club with a predominantly

black membership." Seven months after the 1998 election, however, the county board received a petition with 105 signatures requesting that the polling place be moved to a church three miles southeast of the hunting club. The "overwhelming number of signatures" came from white residents of two communities on the eastern side of the district. Moreover, the Justice Department found that 23 signatures came from residents not registered to vote in the precinct, and only 18 signatures were of persons who had voted at the hunting club. Just before a hearing on the petition, the church withdrew its offer to serve as a polling place. The county board then "authorized the placement of an advertisement for a public hearing on changing the Darvills polling place 'if a suitable centrally located location can be found prior to July 15, 1999.'" Three days before the deadline, a different church – located "at the extreme eastern end" of the precinct with "an overwhelmingly white congregation" – offered its building. The county board approved the change and submitted it for preclearance. The Justice Department determined that because "the black population is heavily concentrated in the western part of the precinct, it appears that the proposed polling place change will impose a significantly greater hardship on minority voters than white voters." As to intent, the letter finds that the county failed to carry its burden, explaining:

> The sequence of events leading up to the decision to change the polling place to [the church] tends to show a discriminatory purpose. The decision was made after the Darvills polling place was changed to a location operated by black persons, and after submission of a petition seeking a change that was signed almost exclusively by white citizens. Moreover, the [church's] congregation is almost exclusively white. Procedural and substantive departures from the normal practice also tend to show a discriminatory purpose. The board of supervisors discounted the recommendation of the electoral board to retain the [hunting club] and, substantively, the desire for a central location, articulated by both the county and the petitioners as the preeminent criterion, was immediately abandoned when the [church] site became available.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, Plaintiff, v. MICHAEL B. MUKASEY, Attorney General of the United States, *et al.*, Defendants.	Civil Action No. 06-1384 Three-judge court (PLF, EGS, DST)

ORDER AND JUDGMENT

(Filed May 30, 2008)

For the reasons set forth in the Opinion issued this same day, it is hereby

ORDERED that the motion for summary judgment of plaintiff Northwest Austin Municipal Utility District Number One [99] is DENIED; it is

FURTHER ORDERED that the motion for summary judgment of defendant Attorney General Michael B. Mukasey [98] is GRANTED; it is

FURTHER ORDERED that the motion for summary judgment of defendant-intervenor Travis County, Texas [96] is GRANTED; it is

FURTHER ORDERED that the motion for summary judgment of defendant-intervenors Texas State

Conference of NAACP Branches, Austin Branch of the NAACP, Rodney Louis, Nicole Louis, Winthrop Graham, Yvonne Graham, Wendy Richardson, Jamal Richardson, Marisa Richardson, Nathaniel Lesane, People for the American Way, Jovita Casares, Angie Garcia, and Ofelia Zapata [100] is GRANTED; it is

FURTHER ORDERED that the motion for summary judgment of defendant-intervenors Lisa Diaz, David Diaz, and Gabriel Diaz [101] is GRANTED; and it is

FURTHER ORDERED that JUDGMENT is entered for the defendant and the defendant-intervenors on both claims in this case.

This is a final appealable Order. The Clerk of the Court shall remove this case from the docket of this Court.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

/s/ Emmet G. Sullivan
EMMET G. SULLIVAN
United States District Judge

/s/ David S. Tatel
DAVID S. TATEL
United States Circuit Judge

DATE: May 30, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, *Plaintiff*, v. MICHAEL B. MUKASEY, Attorney General of the United States, *Defendant*.	Civil Action No. 1:06-CV-01384 (DST, PLF, EGS)

NOTICE OF APPEAL

Plaintiff Northwest Austin Municipal Utility District Number One appeals to the United States Supreme Court from the Court's final judgment entered in this case on May 30, 2008. This appeal is taken pursuant to 42 U.S.C. §1973*b*(a)(5).

DATED: July 7, 2008 Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that I served Plaintiffs Notice of Appeal upon counsel for the parties indicated below by Federal Express July 7, 2008.

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/s/ Christian J. Ward
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Constitutional and Statutory Provisions Involved

The Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Fifteenth Amendment to the Constitution of the United States provides:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Section 4 of the Voting Rights Act of 1965, 42 U.S.C. §1973b, as amended, provides:

> (a)(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision

with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action –

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section;

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any

abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners or observers under subchapters I-A to I-C of this chapter have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 1973c of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title, and have repealed all changes covered by section 1973c of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 1973c of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of this title, and no such

submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory –

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under subchapters I-A to I-C of this chapter; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years

before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the

issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial

resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of title 28.

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rose Parks, and Coretta Scott King Voting Rights Act Reauthorizing and Amendments Act of 2006.

(8) The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rose Parks, and Coretta Scott King Voting Rights Act Reauthorizing and Amendments Act of 2006.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of this section. Any aggrieved party may as of right intervene at any stage in such action.

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which

(1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which

(2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which

(i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which

(ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which

(i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which

(ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting

(1) demonstrate the ability to read, write, understand, or interpret any matter,

(2) demonstrate any educational achievement or his knowledge of any particular subject,

(3) possess good moral character, or

(4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying

or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section if

(1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action,

(2) the continuing effect of such incidents has been eliminated, and

(3) there is no reasonable probability of their recurrence in the future.

(e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State

law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

(f)(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure

shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c) of this section, the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term "test or device," as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: Provided, That where the language of the applicable minority group is

> oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, as amended, provides:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or

prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the

event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

MOTION

No. 08-322

Supreme Court, U.S.
FILED
NOV 26 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Whether a municipal utility district that does not register voters is a "political subdivision" eligible to invoke the bailout provision in Section 4(a) of the Voting Rights Act when the Act's plain language limits such "political subdivision[s]" to counties, parishes, and entities "which conduct[] registration for voting."

2. Whether Congress acted within the scope of its enforcement powers under the Fourteenth and Fifteenth Amendments when in 2006, in light of an extensive legislative record of persistent unconstitutional discrimination against minority voters in covered jurisdictions and years of experience with the Voting Rights Act indicating that a failure to renew Section 5 would result in loss of advancements made in the elimination of discrimination against minority voters, Congress reauthorized Section 5 of the Act.

CORPORATE DISCLOSURE STATEMENT

Three of the intervenor-appellees, the Austin Branch of the NAACP, the Texas State Conference of NAACP Branches, and People for the American Way, are nongovernmental corporations. They have no parent corporations and no stock.

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Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose, Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., pt. 2 (Oct. 25, 2005) 27

152 Cong. Rec. H5143 (daily ed. July 13, 2006) ... 2, 10, 34

152 Cong. Rec. S7745 (daily ed. July 18, 2006) 31

152 Cong. Rec. S7949 (daily ed. July 20, 2006) 10

IN THE

Supreme Court of the United States

No. 08-322

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INTERVENOR-APPELLEES' MOTION TO AFFIRM

Pursuant to this Court's Rule 19.6, the intervenor-appellees (*i.e.*, all appellees other than the Attorney General of the United States) respectfully move for affirmance of the judgment of the district court.

INTRODUCTION

Along with a statutory claim that is precluded by the plain language of the Voting Rights Act (VRA or Act), this case presents a challenge to the constitutionality of Section 5 of the Act, which this Court has already sustained on four occasions. *See South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Georgia* v. *United States*, 411 U.S. 526 (1973); *City of Rome* v. *United*

States, 446 U.S. 156 (1980); *Lopez* v. *Monterey County*, 525 U.S. 266 (1999). Those decisions make clear that Appellant's constitutional challenge also fails, as do *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and its progeny, which point to Section 5 as the model of valid legislation enforcing the Fourteenth and Fifteenth Amendments.

Since Section 5's initial enactment in 1965 as a temporary provision, Congress on four occasions has revisited the Act and concluded that, while Section 5 has proven indispensable to breaking down century-old obstacles to political participation by racial minorities, the need for Section 5 to dismantle those barriers remained. Congress reached that conclusion most recently in 2006, when, after holding over twenty hearings and compiling a record exceeding 15,000 pages (J.S.App. 127), Congress determined that discrimination against minority voters persists in covered jurisdictions and that Section 5 should again be extended. James Sensenbrenner, then-Chairman of the House Judiciary Committee, described the process that resulted in the 2006 reauthorization as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in [the] 27 1/2 years" he had served there. 152 Cong. Rec. H5143, H5143 (daily ed. July 13, 2006). After reviewing the massive legislative record, the district court concluded that Congress acted well within the scope of its enforcement authority in reauthorizing Section 5. That conclusion is plainly correct.

Appellant's central argument as to why Section 5 is now invalid is not only wrong, but illogical. Appellant argues (J.S. 4, 32-35) that Section 5 could be validly reauthorized *only* if jurisdictions subject to its requirements were still engaging in "gamesmanship"—that is,

defying court rulings by enacting unconstitutional voting laws *seriatim*—as some jurisdictions did before being subjected to coverage. In other words, Section 5 could be reauthorized only if it had failed.

The district court sensibly rejected this assertion, which is unsupported by any decision of this Court, and concluded that there is "no basis" for questioning Congress's judgment in reauthorizing Section 5. J.S.App. 143. Given the legislative record of ongoing discrimination, that conclusion is unassailable—whatever the standard of review applicable to a constitutional challenge against Section 5, an issue that in this case is entirely academic. The district court's judgment should be summarily affirmed.

STATEMENT

I. THE VOTING RIGHTS ACT

A. The Origins And Operation Of Section 5

Congress's judgment in 2006 that there was a need to reauthorize Section 5 must be understood in light of the historical experience that led to the Act's original enactment. After the ratification of the Fourteenth and Fifteenth Amendments, which were intended to ensure equality of citizenship without regard to race, and which expressly granted Congress enforcement authority, certain States and localities began defying those constitutional mandates by instituting laws and practices designed to prevent minority citizens from voting. *Katzenbach*, 383 U.S. at 311.

After nearly a century of massive disenfranchisement of racial minorities, Congress enacted the Civil Rights Acts of 1957, 1960, and 1964, each of which sought to "facilitat[e] case-by-case litigation" against voting discrimination. *Katzenbach*, 383 U.S. at 313.

This incremental approach proved ineffective. *Id.* at 314. Concluding that "the unsuccessful remedies which it had prescribed ... would have to be replaced by sterner and more elaborate measures," *id.* at 309, Congress enacted the Voting Rights Act of 1965. *See* Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 *et seq.*).

Section 5—the "heart" of the Act, *Katzenbach*, 383 U.S. at 315—requires certain jurisdictions to obtain "preclearance" before implementing any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c. To obtain preclearance, a jurisdiction must either submit the proposed change to the Department of Justice (DOJ) for an administrative determination or file a declaratory judgment action in the United States District Court for the District of Columbia. *Id.*; 28 C.F.R. § 51.10. In either forum, the jurisdiction must show that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or language-minority status. 42 U.S.C. § 1973c; 28 C.F.R. § 51.52.

Only certain States and "political subdivisions"—a term defined by Section 14(c)(2) of the Act—are covered by Section 5. A jurisdiction is covered if, during the 1964, 1968, or 1972 presidential election, (a) the jurisdiction maintained a "test or device" for voting or registration, and (b) the jurisdiction had less than a 50% voter registration rate, or fewer than 50% of registered voters actually voted in the presidential election. 42 U.S.C. § 1973b(b). If a jurisdiction is covered, then all governmental units within that jurisdiction are also subject to preclearance requirements. 28 C.F.R. § 51.6. Texas has been a covered jurisdiction since 1975, *see* 40

Fed. Reg. 43,746, 43,746 (Sept. 23, 1975), when the coverage formula was amended to ensure protection of "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage," *see* 42 U.S.C. § 1973*l*(c)(3), after Congress found that tests and devices had been used to disenfranchise those minority voters much as they had been used to prevent African-Americans from voting, S. Rep. No. 94-295, at 25-27 (1975). Because of Texas's statewide coverage, all political subunits in Texas, including Appellant, are subject to the preclearance requirement.

Congress provided for flexibility in the scope of the Act's coverage in two respects. First, Congress included a procedure for exemption from Section 5's preclearance obligations: the "so-called 'bailout' provision." *Rome*, 446 U.S. at 167. A jurisdiction eligible to bailout may do so by showing, in a declaratory judgment action in the United States District Court for the District of Columbia, that it has satisfied certain statutory criteria over the preceding ten-year period. 42 U.S.C. § 1973b(a)(1). The district court here noted that "every one of the fourteen jurisdictions to have applied since 1984 has, with the Attorney General's support, succeeded in terminating coverage." J.S.App. 140. Second, a court can "bail-in" a non-covered jurisdiction—*i.e.*, subject the jurisdiction to preclearance requirements—if the court finds "that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred" within that jurisdiction. 42 U.S.C. § 1973a(c); *see, e.g.*, *Jeffers* v. *Clinton*, 740 F. Supp. 585, 594, 600 (E.D. Ark. 1990).

B. This Court's Prior Decisions Sustaining Section 5, As Initially Enacted And Reauthorized

Shortly after the VRA's enactment, South Carolina challenged the statute, including Section 5, asserting that Congress had exceeded its authority to enforce the Fifteenth Amendment. This Court rejected that challenge in *Katzenbach*, holding that the Act was justified by the exceptional history of voting discrimination in covered jurisdictions. 383 U.S. at 334.

Congress reauthorized Section 5 in 1970 and again in 1975 and 1982. Subsequent to each of those three reauthorizations, a jurisdiction challenged Section 5 as reauthorized, and this Court sustained Section 5's constitutionality.

"Following the dramatic rise in registration" after the 1965 passage of the Act, "a broad array of dilution schemes were employed to cancel the impact of the new black vote." S. Rep. No. 97-417, at 6 (1982). "Their common purpose and effect [was] to offset the gains made at the ballot box under the Act." *Id.* Against this backdrop, Congress reauthorized Section 5 in 1970. In a challenge brought after the 1970 reauthorization, this Court reaffirmed Section 5's constitutionality. *Georgia* v. *United States*, 411 U.S. at 535.

Following the 1975 reauthorization, the City of Rome, Georgia, argued that, even if the preclearance requirements were constitutional in 1965, by 1975 "they had outlived their usefulness." *Rome*, 446 U.S. at 180. The Court disagreed. Reviewing the legislative record of past and ongoing voting discrimination against racial minorities, the Court concluded that the 1975 reauthorization was well within Congress's constitutional enforcement powers. *See id.* at 180-182.

Before the VRA was set to expire in 1982, Congress again considered whether to reauthorize Section 5. Congress did so, noting that a pattern of ongoing discrimination and widespread opposition to equal voting rights persisted despite the previous reauthorizations. *See* H.R. Rep. No. 97-227, at 13-20 (1981). Texas particularly embodied this pattern: though Texas was not covered until 1975, by 1982 DOJ had interposed almost as many Section 5 objections for Texas jurisdictions as it had for those of any other State. H.R. Rep. No. 109-478, at 73 (2006).

Since the 1982 reauthorization (and the 1997 *Boerne* decision), this Court has again reaffirmed Section 5's constitutionality—even as applied to a separately covered county in a non-covered State making a voting change mandated by state law. *Lopez*, 525 U.S. at 282. In other recent cases not directly involving Section 5, the Court has repeatedly noted Section 5's constitutionality. *See* p. 22, *infra* (discussing the *Boerne* cases).

C. The 2006 Reauthorization

From October 2005 to July 2006, Congress held 21 hearings to consider whether Section 5's protections remained necessary in the covered jurisdictions. H.R. Rep. No. 109-478, at 5; S. Rep. No. 109-295, at 2-4 (2006). Congress's investigation produced a legislative record over 15,000 pages in length. J.S.App. 13-15, 127.

Notwithstanding Section 5's prophylactic protections, the record showed significant continuing and purposeful efforts by covered jurisdictions to discriminate against minority voters. This discrimination took many forms, including discriminatory methods of election (J.S.App. 95, 100-102, 156-158, 169-173), racially selective annexations (J.S.App. 84-85, 165-167, 174-178), dis-

criminatory polling place changes (J.S.App. 178-179, 181-183), election cancellations (J.S.App. 165-167), redistricting for the purpose of preventing minority voters from electing the candidates of their choice (J.S.App. 79-80, 100, 155-157, 159-165, 167-169, 180-181), and the adoption of other strategies designed to prevent minority voters from casting ballots and minority candidates from winning election (J.S.App. 92-93, 95-100, 102). From 1980 to 2000, the Attorney General issued objection letters concerning 421 voting changes that appeared to be motivated by discriminatory purpose. J.S.App. 114.[1] The record showed that DOJ had interposed more objections to Section 5 submissions since the 1982 reauthorization than before. J.S.App. 66, 76-77.

Congress also considered "more information requests" ("MIRs"), letters from DOJ asking jurisdictions seeking preclearance for additional information about proposed changes. H.R. Rep. No. 109-478, at 40. Since 1982, MIRs led jurisdictions to alter or withdraw proposed voting changes in over 800 instances. *Id.* at 40-41 & n.92.

Congress also heard testimony regarding Section 5's deterrent effects. J.S.App. 109-110. Describing preclearance as a "vital prophylactic tool[]," the House Judiciary Committee concluded that in a number of instances, "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, at 21, 24.

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[1] The appendix to the district court's opinion (J.S.App. 155-183) includes numerous examples of DOJ objection letters issued between 1982 and 2005 on the basis of discriminatory intent in covered jurisdictions.

The need for reauthorization was also apparent from discrimination documented through parts of the Act other than Section 5. The record showed that each year between 1982 and 2006, the Attorney General had, in response to reports of actual or likely intimidation of minority voters, appointed over 300 federal observers to monitor minority voters' access to polling places in covered jurisdictions. J.S.App. 103-104. The congressional record also included evidence of purposeful discrimination unveiled through litigation brought under Section 2. J.S.App. 95-103.[2]

Based on the legislative record, Congress found that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment ... [and that] without the continuation of the [Act's] protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, ... undermining the significant gains made by minorities in the last 40 years." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (the "VRARA"), Pub. L. No. 109-246, § 2(b)(7), (9), 120 Stat. 577, 578. With the reauthorization legislation receiving overwhelming, bi-

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[2] Section 2, "the Act's basic prohibition against racial discrimination in voting" (J.S.App. 93), is a permanent provision that contains a nationwide ban on imposition of any "voting qualification or prerequisite to voting, or standard, practice, or procedure ... which results in a denial or abridgment of the right ... to vote on account of race or color" or membership in a language minority group. 42 U.S.C. §§ 1973(a), 1973b(f)(2).

partisan support,[3] Congress extended Section 5's protections for another 25 years, through 2031. *See id.* § 4, 120 Stat. 580.

II. PROCEDURAL HISTORY

The Northwest Austin Municipal Utility District Number One (the District, or Appellant) is a local governmental entity located within the City of Austin and Travis County, Texas. Since the District's formation in the 1980s, Travis County—not the District—has always conducted the voter registration of individuals who reside in the District. J.S.App. 18, 22.

Complying with Section 5 has imposed only a nominal burden on the District. The monetary cost amounts, on average, to just $233 per year. Nor has compliance with Section 5 caused the District any delay in implementing voting changes. All changes that the District has submitted have been precleared by the DOJ. The District has not identified any proposed voting change that it has decided to forego because the contemplated change would have required a preclearance submission. J.S.App. 152-153.

Nonetheless, eight days after the VRARA became law, the District filed this case, seeking bailout or, in the alternative, a declaration that Section 5 exceeds Congress's authority under the Fifteenth Amendment. J.S.App. 19. Travis County, eleven individuals residing in the District, three individuals residing elsewhere in Texas, and three organizations intervened as defen-

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[3] *See* 152 Cong. Rec. S7949, S8012 (daily ed. July 20, 2006) (unanimous approval in Senate); 152 Cong. Rec. H5143, H5207 (daily ed. July 13, 2006) (House vote of 390-33).

dants. A three-judge panel of the United States District Court for the District of Columbia heard the case.

In a comprehensive opinion addressing both of the District's claims, the district court granted the Attorney General's and the intervenors' motions for summary judgment and denied the District's cross-motion for summary judgment. First, the court held that the District was ineligible to bail out from its preclearance obligations under Section 5 because it is not a "political subdivision" eligible to initiate a bailout action. The court determined that Congress intended the term "political subdivision" in the bailout provision to carry the definition supplied in Section 14(c)(2) of the Act, which encompasses only counties, parishes, and other subdivisions within a State that—unlike the District—register voters. J.S.App. 20-30.

Second, the court rejected the District's constitutional challenge. The court concluded that *Katzenbach* sets forth a rational-basis standard under the Fifteenth Amendment that governs this challenge. J.S.App. 32-33. The court nonetheless thoroughly evaluated the statute under both the rational-basis test and the congruence-and-proportionality test described in *Boerne*.

Applying the rational-basis test, the court concluded that "given the extensive legislative record documenting contemporary racial discrimination in voting in covered jurisdictions, Congress's decision to extend section 5 for another twenty-five years was rational and therefore constitutional." J.S.App. 2.

The court likewise held that Section 5 as reauthorized in 2006 passes muster under *Boerne*'s three-step congruence-and-proportionality test. J.S.App. 2, 143-144. Applying the first step—identification of the constitutional right at issue—the court noted that the two

rights enforced by Section 5—the right to be free of official racial discrimination and the right to vote—each receives the highest level of judicial scrutiny. J.S.App. 122. Addressing *Boerne*'s second step—the record of constitutional violations—the court emphasized that the 2006 legislative record was comparable to the record Congress compiled during the 1975 reauthorization and far more extensive than the records supporting other statutes sustained under the *Boerne* framework. J.S.App. 124-128. As to the third *Boerne* step—the congruence and proportionality of the statutory scheme—the court pointed to Section 5's limiting features, including its targeted coverage of only those jurisdictions with the most severe histories of discrimination in voting, its bailout and bail-in provisions for tailoring coverage, and its limited time frame. J.S.App. 133-134. Accordingly, the court held that whether judged under the rational-basis or congruence-and-proportionality standards, Section 5 remains constitutionally sound.

ARGUMENT

As the district court held, the VRA's plain language establishes that Appellant is ineligible to bail out of Section 5. The district court also properly concluded, based on its close review of this Court's decisions and the 2006 reauthorization's extensive legislative record, that Section 5 remains constitutional. The district court's judgment should therefore be summarily affirmed.

I. APPELLANT IS NOT ELIGIBLE FOR BAILOUT

The VRA's text and legislative history, the Attorney General's implementing regulations, and this Court's decisions, especially *Rome*, all compel the con-

clusion that Appellant is not eligible to bail out from Section 5.

A. The Statute's Text And Structure Show Appellant Is Ineligible For Bailout

Under the VRA as originally enacted, only covered States and separately covered "political subdivisions"—for example, counties that were designated for coverage when their parent State was not—were eligible for bailout. During the 1982 reauthorization, Congress amended the bailout provision to expand bailout eligibility to "political subdivisions" not separately designated for coverage. *See* 42 U.S.C. § 1973b(a)(1). Thus, since 1982, unlike before, a county in a fully covered State (such as Texas) has been eligible to bail out of coverage independently of the State. The scope of this expansion is unambiguous. Today, as in 1982, Section 14(c)(2) of the VRA defines "political subdivision" to mean "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, ... any other subdivision of a State which conducts registration for voting." *Id.* § 1973*l*(c)(2). Because the District is neither a county nor a parish, and because Travis County conducts registration for the District, Section 14(c)(2)'s plain language makes clear that the District is not a "political subdivision" eligible for bailout.[4]

As the district court explained, Section 4(a) of the Act confirms that Congress intended Section 14(c)(2)'s definition of "political subdivision" to govern which ju-

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[4] When Congress defines a term in a statute, courts must employ that definition. *See, e.g.*, *Rowland* v. *California Men's Colony*, 506 U.S. 194, 200 (1993). Thus, the District's citations to a dictionary and to Texas law (*see* J.S. 14) are inapposite.

risdictions other than States may seek bailout. J.S.App. 24-25. As amended in 1982, Section 4(a) makes eligible for bailout "any political subdivision of [a covered] State ... *though [coverage] determinations were not made with respect to such subdivision as a separate unit.*" 42 U.S.C. § 1973b(a)(1) (emphasis added). Because only entities that satisfy the Section 14(c)(2) definition of "political subdivision" can be separately designated for coverage, this language demonstrates that Congress was applying the Section 14(c)(2) definition of "political subdivision" in Section 4(a).

Therefore, the District's contention that Congress intended "political subdivision" in Section 4(a) to refer to any governmental unit is plainly incorrect. Indeed, if Congress had intended the term "any political subdivision" in Section 4(a) to mean any jurisdiction within a State, Congress would have simply provided that "any political subdivision" could seek bailout. Under the District's reading, the language in Section 1973b(a)(1) following "any political subdivision of [a covered] State" would be surplusage.

Further, the contention that the District—and every other subunit of a covered State such as Texas—qualifies as a "political subdivision" runs counter to the bailout provision's text in additional ways. Section 4(a) provides that, in addition to States and "political subdivision[s]" within covered jurisdictions, "any political subdivision with respect to which [coverage] determinations have been made as a separate unit" may seek bailout. 42 U.S.C. § 1973b(a)(1). Because governmental entities that do not register voters cannot be separately covered under Section 5, *see id.* §§ 1973b(b), 1973*l*(c)(2), the term "political subdivision" in this latter clause must refer only to counties, parishes, and entities that register voters—*i.e.*, "political subdivisions"

under Section 14. The District's interpretation of the bailout provision thus rests on the dubious proposition that Congress silently intended the term "political subdivision" to have two different meanings within Section 4(a).

Moreover, Section 4(a) provides that the showing required for bailout must be made by the applicant "State or political subdivision and all governmental units within its territory." 42 U.S.C. § 1973b(a)(1)(D), (F). This language makes clear that Congress distinguished "political subdivision[s]" from other "governmental units," and reflects Congress's assumption that jurisdictions seeking bailout would have "governmental units," not themselves eligible for bailout, within their boundaries. The District is precisely such a governmental unit.

B. The Legislative History And Longstanding Administrative Regulations Confirm Appellant Is Ineligible For Bailout

As the district court observed (J.S.App. 25-26), the 1982 reauthorization's legislative history confirms that political subunits of States (other than counties and parishes) that do not conduct voter registration are ineligible for bailout. The House Report stated that the "standard for bail-out is broadened to permit political subdivisions, *as defined in Section 14(c)(2)* ... to bail out although the state itself may remain covered." H.R. Rep. No. 97-227, at 2 (1981) (emphasis added); *see also id.* at 39; S. Rep. No. 97-417, at 2, 69 (1982) (similar language). The Senate Report explained that permitting bailout only by Section 14(c)(2) "political subdivisions" reflects a "logistical limit"—because if every subcounty level political subunit were eligible to seek separate bailout, "we could not expect that the Justice

Department or private groups could remotely hope to monitor and to defend the bailout suits." S. Rep. No. 97-417, at 57 n.192.[5]

The District argues that the 1982 legislative history should be disregarded in favor of the 2006 legislative history. J.S. 16-17. But because Congress most recently amended the standards governing bailout eligibility during the 1982 reauthorization, that legislation is the appropriate focus of inquiry. *See, e.g., Rome*, 446 U.S. at 169 (referring to the 1965 legislative history to construe the bailout provision in 1980). And Congress surely did not intend to broaden the class of jurisdictions eligible for bailout when it made no alteration to that text in 2006. *See Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 484 (1997). In any event, the 2006 legislative history confirms that the District is ineligible to bailout independently of Texas or Travis County. During the reauthorization hearings, two witnesses specifically urged Congress to expand bailout eligibility to include entities other than "political subdivisions." *See* J.S.App. 28. Congress, however, left the provision governing the entities eligible to seek bailout unchanged.

Similarly unavailing is the District's reliance (J.S. 17) on a single statement from the 2006 legislative history that "[t]he expiring provisions of the Voting Rights Act allow any covered jurisdiction to remove

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[5] The district court correctly rejected Appellant's contention that under the narrower reading of the bailout provision, only jurisdictions in Virginia—which according to Appellant, are uniquely structured to have few subunits—would have a realistic opportunity to bailout. *See* J.S.App. 139-140 (noting that one Virginia jurisdiction that successfully bailed out had a number of subunits "almost identical to Texas's median" number of subunits per county).

itself from coverage," H.R. Rep. No. 109-478, at 93. The District is subject to Section 5 not because of any independent coverage determination, but because it is a political subunit that lies within the State of Texas, a covered jurisdiction. *See Rome*, 446 U.S. at 166. Thus, it is Texas—not the District—that is the relevant "covered jurisdiction" within the meaning of the passage upon which the District relies.

The Attorney General's regulations implementing the bailout provision confirm this reading. In place since 1987, *see* 52 Fed. Reg. 486, 490-500 (Jan. 6, 1987), those regulations adopt Section 14(c)(2)'s definition of "[p]olitical subdivision"—distinguishing between "political subdivision[s]" (counties, parishes, and local governments that register voters), which are eligible to seek bailout, and "political subunits," which are not. *Compare* 28 C.F.R. §§ 51.2, 51.5 *with id.* § 51.6. The "substantial deference" this Court generally affords the Attorney General's interpretation of Section 5, *Lopez*, 525 U.S. at 281, is particularly appropriate in this context because Congress amended the Act against the backdrop of those longstanding regulations, but left the provision governing the scope of entities eligible for bailout unchanged. *See* J.S.App. 27-28

C. The Decisions Relied On By Appellant Are Inapposite

In arguing that it qualifies as a "political subdivision" for bailout purposes, the District relies (J.S. 12-15) on statements in *United States* v. *Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978), and *Dougherty County Board of Education* v. *White*, 439 U.S. 32 (1978). Those decisions, however, concern the scope of Section 5's application, not Section 4(a) bailout. *Sheffield* held that Section 5 applies to all gov-

ernmental units located within any jurisdiction designated for coverage under Section 5, not just subunits meeting Section 14's definition of "political subdivision." The Court reasoned that Section 5's coverage parallels the scope of the Act's suspension of tests and devices, which applies "*in* any [designated] State ... or *in* any [designated] political subdivision," 435 U.S. at 120 (quoting § 4(a) (alterations in original))—thus reaching tests imposed by governmental units located within covered states or political subdivisions, not just tests imposed *by* covered states or political subdivisions. *See id.* at 120-134. *Dougherty County* reiterated *Sheffield*'s conclusion that Section 14's definition of "political subdivision" does not exempt any unit within a covered jurisdiction from compliance with Section 5. 439 U.S. at 43-47. As the district court concluded (J.S.App. 28-29), because neither *Sheffield* nor *Dougherty County* addresses bailout, those decisions say nothing about which jurisdictions are eligible to *seek* bailout.

The District seizes on two statements in *Sheffield* that, according to the District's out-of-context interpretation, establish that the Section 14(c)(2) definition of "political subdivision" does not apply to the bailout provision in Section 4(a) of the Act. J.S. 12-13. That argument is foreclosed by *Rome*, in which this Court explained that "*Sheffield* ... did *not* hold that cities [that do not register voters] are 'political subdivisions' under §§4 and 5." 446 U.S. at 168 (emphasis added); *see also* J.S.App. 28-29. The Court also concluded that, "under the express statutory language," the City of Rome, which did not register voters, was "not a 'political subdivision' for purposes of § 4 'bailout.'" 446 U.S. at 168; *see also id.* at 168 & n.5 (recognizing that § 14(c)(2) defines "political subdivision" for purposes of

the Act). Although the 1982 reauthorization amended Section 4 to allow bailout by a "political subdivision" that had not itself been the subject of a coverage designation, Pub. L. No. 97-205, § 2(b)(2), 96 Stat. 131, 131, that legislation did nothing to repudiate the *Rome* Court's teaching that Section 14's definition of "political subdivision" governs the term's meaning in the bailout provision. Nor, as the district court explained (J.S.App. 20-26, 30), did the 1982 reauthorization extend bailout eligibility to the great number of jurisdictions that lie within States and political subdivisions.

Finally, the District's reliance (J.S. 21) on this Court's cases applying the constitutional avoidance canon is misguided. Saving constructions are appropriate only when there are "competing plausible interpretations of a statutory text" and one "alternative which raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005). As detailed above, Congress's intent not to extend bailout eligibility to those political subunits that do not conduct voter registration—such as the District—is clear. And as set forth in Part II, *infra*, the reauthorization of Section 5 was unquestionably within Congress's remedial power.

II. SECTION 5 REMAINS CONSTITUTIONAL

Confronted with a substantial record demonstrating that discrimination against minority voters remains a serious problem in covered jurisdictions and that the incidence of such discrimination would be greater but for Section 5, Congress reauthorized Section 5 in 2006. This Court's precedents—both those decisions that directly uphold the constitutionality of Section 5 and those that identify Section 5 as the model of permissible enforcement legislation—confirm that in doing so, Congress acted well within its enforcement authority.

Appellant does not dispute that *Katzenbach*, *Rome*, and *Lopez* are good law (J.S. 23-27) and offers no new doctrinal arguments explaining how Section 5 might now be invalid. Appellant argues that the district court applied an inappropriately lenient standard of review to the reauthorization of Section 5, and that the reauthorization should be tested under what it describes as the more demanding scrutiny required by *Boerne*. But the standard of review is ultimately of no moment here because Section 5 is clearly valid under the *Boerne* framework. J.S.App. 143-144. Thus, this case presents no question with respect to the appropriate standard for reviewing constitutional challenges to Section 5, *see Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) ("summary affirmance is an affirmance of the judgment only"), nor any other question warranting plenary review.

A. This Court Has Repeatedly Confirmed Section 5's Constitutionality

1. This Court has repeatedly upheld Section 5 against constitutional challenge. After Congress enacted the VRA, the Court held in *Katzenbach* that Section 5 was an "appropriate means for carrying out Congress' constitutional responsibilit[y]" to prohibit racial discrimination in voting. 383 U.S. at 308. In so concluding, the Court highlighted two important historical points. First, the record assembled by Congress before the Act's passage showed a hundred-year history of pervasive official racial discrimination in voting in certain parts of the country. *Id.* at 308-315. Second, through the post-Civil War Amendments, "the power of Congress [was] enlarged," so that Congress could guarantee the rights these amendments granted. *Id.* at 325.

This Court reaffirmed Section 5's constitutionality in *Georgia* v. *United States* after the 1970 reauthorization. 411 U.S. at 535. Following Congress's 1975 reauthorization, Rome, Georgia, brought another challenge, asserting that, even if the preclearance requirements were constitutional when enacted, "they had outlived their usefulness by 1975." *Rome*, 446 U.S. at 180. Reiterating that the Reconstruction Amendments were "designed as an expansion of federal power and an intrusion on state sovereignty," *id.* at 179, the Court concluded that the reauthorization was well within Congress's Fourteenth and Fifteenth Amendment enforcement powers, *id.* at 181-182.

In *Lopez*, this Court again held that Section 5 is appropriate enforcement legislation—even as applied to "nondiscretionary" actions by counties to implement "acts initiated by non-covered states." 525 U.S. at 282-283. Quoting *Boerne*, the Court reaffirmed that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." *Id.*

In 2006, prior to Congress's vote on Section 5's reauthorization, this Court again underscored Section 5's validity when all eight Justices who reached the issue held that compliance with Section 5 is a compelling state interest for the purpose of applying strict scrutiny. *See League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 475 n.12, 485 n.2, 518-519 (2006) ("*LULAC*"). These precedents informed Congress's 2006 reauthorization.

2. Although this Court has consistently upheld Section 5—including in one case relying on *Boerne*—the District argues that *Boerne* made a sharp break with the past and that, under that decision, Section 5 is unconstitutional because it is not a congruent and proportional exercise of Congress's enforcement powers. But this Court's decisions applying *Boerne* have consistently pointed to Section 5 as a model of the proper use of congressional enforcement powers. In *Boerne* itself, the Court cited the VRA, including Section 5, as the leading example of valid enforcement legislation. 521 U.S. at 525-527. The Court thus used Section 5 as a point of distinction from the statute before it—the Religious Freedom Restoration Act—which the Court stated was "so out of proportion" to any possible objective of enforcing a constitutional provision that it could only be understood as an attempt to work a "substantive change in constitutional provisions." *Id.* at 532. The Court's decisions following *Boerne* have likewise distinguished Section 5 from various statutes held invalid. *See Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 373-374 (2001); *United States* v. *Morrison*, 529 U.S. 598, 626 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999).

This Court's favorable citation of Section 5 in *Boerne* and its progeny is unsurprising. *Boerne*'s congruence-and-proportionality test is directed at a particular concern—the possibility that Congress might try to engage in a substantive redefinition or expansion of constitutional rights, *Boerne*, 521 U.S. at 519-529; *see also Garrett*, 531 U.S. at 365; *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000). The congruence-and-proportionality test guides courts in determining whether legislation deters and remedies violations of

constitutional rights (and is thus valid) or attempts to redefine them (and is thus invalid). *Boerne*, 521 U.S. at 519. Because official racial discrimination in voting indisputably violates the Fourteenth and Fifteenth Amendments, legislation designed to prevent and remedy that evil raises no specter of congressional redefinition of those constitutional provisions.

Nothing in the 2006 record suggests that Congress set out to redefine the substance of the Fourteenth or Fifteenth Amendment when it reauthorized Section 5. The district court thus appropriately applied the teachings in the *Boerne* cases that expressly distinguish Section 5 from statutes that substantively redefine rights, and also properly recognized the import of other controlling precedents that are embraced rather than displaced in that line of cases. "When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." *Boerne*, 521 U.S. at 536.

B. Section 5 Is A Congruent And Proportional Response To A Pattern Of Constitutional Violations In Covered Jurisdictions

When considered in light of this Court's numerous decisions sustaining or favorably analyzing Section 5, as well as the record before Congress of ongoing, persisting discrimination against minority voters, Appellant's *Boerne*-based challenge to the 2006 reauthorization raises no issue worthy of plenary review. As the district court recognized, the *Boerne* framework entails three inquiries. J.S.App. 120-121. First, the court must

determine "whether a challenged statute implicates a fundamental right or protected class." J.S.App. 45; *see Tennessee* v. *Lane*, 541 U.S. 509, 522 (2004); *Garrett*, 531 U.S at 365. Second, the court must examine the "gravity of the harm [the legislation] seeks to prevent," *Lane*, 541 U.S. at 523, "guided by the principle that the propriety of any § 5 legislation 'must be judged with reference to ... historical experience.'" *Florida Prepaid*, 527 U.S. at 639-640. Third, the court must evaluate whether the statutory scheme is congruent and proportional to the record before Congress and to the risk of future harm (and therefore properly considered a remedial or preventive measure), or whether, instead, the legislation is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 532. Section 5, as the district court concluded in its thorough analysis of the legislative record under *Boerne*, readily satisfies this test.

1. In enacting Section 5, Congress acted at the height of its enforcement powers

This Court has twice applied the congruence-and-proportionality test to legislation protecting classes or constitutional rights that implicate heightened judicial scrutiny. In both cases, the Court upheld the law. *See Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 728-729, 735-736 (2003) (Family Medical Leave Act is valid remedial legislation designed to combat gender discrimination); *Lane*, 541 U.S. at 533 (Title II of the ADA, as applied to courthouse access, is a reasonable prophylactic measure). By contrast, the Court has struck down statutes targeting classifications that receive only rational-basis review. *See Kimel*, 528 U.S. at

83-84 (age classifications); *Garrett*, 531 U.S. at 366-367 (Title I of the ADA). These cases show that, when the right or class at issue receives heightened scrutiny, Congress can more readily demonstrate the need for enforcement legislation. *See* J.S.App. 45.

Congress acted at the zenith of its enforcement authority in reauthorizing Section 5. Section 5 remedies and deters conduct subject to strict judicial scrutiny in two respects. First, Section 5 addresses racial discrimination by state actors, conduct that receives the strictest judicial scrutiny. *See, e.g.*, *Johnson* v. *California*, 543 U.S. 499, 509 (2005). Second, Section 5 addresses infringements upon the right to vote, which, as a right "preservative" of all others, is "fundamental," *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886), such that "any alleged infringement of [it] ... must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964).

Because racial discrimination in voting is prohibited by both the Fourteenth and Fifteenth Amendments, laws targeting such unconstitutional conduct raise few of the concerns that the Court has indicated are presented by measures that rest on the Fourteenth Amendment alone. As the district court observed, there is a greater risk that Congress might use its Fourteenth Amendment enforcement power to "redefine substantive rights" because the Fourteenth Amendment "functions as a vehicle through which various rights ... apply to the States." J.S.App. 48. Thus, in contrast to *Boerne*, where this Court found constitutionally troublesome the broad sweep of RFRA, which was applicable to virtually every action by every State and political subunit, this Court has never suggested that the VRA, which is focused specifically on racial discrimination in voting, raises com-

parable constitutional concerns. Indeed, this Court's precedents are to the contrary.

2. Extensive evidence demonstrates the continuing need for Section 5

Jurisdictions covered by Section 5, including Texas, have "a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to ... vote." *LULAC*, 548 U.S. at 439 (internal quotation marks omitted). Congress in 2006 found, after an extensive investigation, that minority voters in covered jurisdictions continue to encounter discrimination and that this discrimination would have been far more severe if not for Section 5.

The legislative record, as the district court recognized, easily justified Congress's 2006 reauthorization under this Court's precedents. The *Rome* Court sustained the 1975 reauthorization based on its analysis of three categories of evidence: (1) racial disparities in registration, (2) minority electoral representation, and (3) DOJ Section 5 objections. *See* 446 U.S. at 180-182. Congress received similar evidence in each category in 2006. As in 1975, Congress in 2006 found significant racial disparities in registration rates in two fully covered States and one partially covered State. J.S.App. 59-62. In 2006, as in 1975, "gains by minority candidates remain[ed] uneven, both geographically and by level of office." J.S.App. 63. For example, no African-American had ever been elected to statewide office in Mississippi, Louisiana, or South Carolina, despite their significant African-American populations. H.R. Rep. No. 109-478, at 33.

DOJ objections also showed persistent efforts to discriminate against minority voters. DOJ interposed more objections between 1982 and 2004 (626) than be-

tween 1965 and 1982 (490)—including challenges to at least one statewide change in every fully covered State and most partially covered States. J.S.App. 66, 69-71. Discriminatory changes made by local governmental entities drew hundreds of objections. Such objections were particularly numerous in areas with high percentages of minority residents. J.S.App. 68, 72-75. Between 1980 and 2000, 421 objections were based in whole or in part on state actors' intentional discrimination against minority voters. J.S.App. 76-77.

These intentionally discriminatory acts took many forms, and were often egregious. Recent examples at both the state and local level are illustrative. Mississippi drew an objection for reviving its intentionally discriminatory dual registration system, which the State refused to submit for preclearance until this Court's decision in *Young* v. *Fordice*, 520 U.S. 273 (1997), forced it to do so. J.S.App. 78-79. Texas drew a statewide objection based on intentional discrimination when the State created a judgeship using electoral methods that the legislature knew prevented minority citizens from electing candidates of choice. *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2430-2432 (Oct. 25, 2005).

At the local level, in the decade prior to the 2006 reauthorization, DOJ objections blocked purposefully discriminatory annexations in Texas, South Carolina, and Mississippi and forestalled intentionally discriminatory redistricting plans by local legislative bodies in Louisiana, Alabama, Georgia, and Virginia. J.S.App. 155-156, 159-167, 174-178, 180-181. In 2000, DOJ objected to a redistricting plan devised by Webster County, Georgia that would have reduced African-

American voting power after the county elected its first majority-black school board; the Attorney General found the purported justifications for the change pretextual. J.S.App. 160-161. Similarly, DOJ interposed an objection when Kilmichael, Mississippi took the extraordinary step in 2001 of cancelling local elections after African-Americans became a majority of the town's population and an "unprecedented number" of African-Americans sought office. J.S.App. 78.

In addition to the three categories of evidence the Court relied on in *Rome* to uphold the 1975 reauthorization, Congress in 2006 also reviewed other significant types of evidence. Congress noted the frequency with which covered jurisdictions brought unsuccessful declaratory judgment actions attempting to preclear proposed changes. In one striking example, in 2001, Louisiana sought judicial preclearance (in a suit ultimately withdrawn) of a redistricting plan that was purposefully designed to diminish electoral opportunities for black voters and increase the electoral strength of white voters. In addition, the record showed that many other such suits led to judicial rulings that deemed the changes at issue purposefully discriminatory. J.S.App. 84-88.

Further, Congress received evidence of continued non-compliance with Section 5, including at least 105 successful private Section 5 enforcement suits since 1982. J.S.App. 114. As recently as 2004, such a suit derailed an attempt by a Texas jurisdiction to disenfranchise students at a historically black university. J.S.App. 90-92.

Congress also received evidence of official harassment of minority voters, including instances in Texas of police officers being stationed near polls in Hispanic

neighborhoods to intimidate voters, and singling out minorities for illegal scrutiny and harassment. S. Rep. No. 109-295, at 342-345. And the 2006 reauthorization was under consideration in Congress when this Court determined that a recent redistricting effort by Texas "bears the mark of intentional discrimination that could give rise to an equal protection violation." *LULAC*, 548 U.S. at 440.

In addition, Congress recognized that a jurisdiction's decision to withdraw a preclearance submission in response to a DOJ request for more information is often "illustrative of a jurisdiction's motives." H.R. Rep. No. 109-478, at 40. Congress thus concluded that the 855 instances in which proposed voting changes were withdrawn following such requests suggest continuing purposeful discrimination. J.S.App. 81-83. Texas has led the nation in such withdrawals. J.S.App. 83.

Section 5 has also had a substantial deterrent effect. J.S.App. 108-112. As Congress's investigation revealed, Section 5 is responsible for many "discriminatory voting changes ... hav[ing] never materialized." H.R. Rep. No. 109-478, at 36. Therefore, Congress concluded—and appropriately took into account, *see Boerne*, 521 U.S. at 532-533 (citing *Rome*, 446 U.S. at 177)—that a repeal of Section 5 would lead to considerable backsliding.

When compared to the records assembled in *Hibbs* and *Lane*, the sufficiency of the 2006 reauthorization record is apparent. J.S.App. 125-128. The 2006 record documents "the very kind of intentional discrimination the dissenters in *Hibbs* and *Lane* thought missing in those cases but present in *Katzenbach* and *City of Rome*." J.S.App. 127; *see Hibbs*, 538 U.S. at 756 (Ken-

nedy, J., dissenting); *Lane*, 541 U.S. at 547-548 (Rehnquist, C.J., dissenting); *see also id.* at 564 (Scalia, J., dissenting) (requiring an "identified history of relevant constitutional violations").

In *Hibbs*, this Court upheld the FMLA "based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional conduct." *See Lane*, 541 U.S. at 528 & n.17 (discussing *Hibbs*, 538 U.S. at 728-733). In *Lane*, the principal evidence consisted of "testimony from persons with disabilities who described the physical inaccessibility of local courthouses." *Id.* at 527. As the district court here recognized, the 2006 reauthorization record "dwarfs those considered adequate in *Hibbs* and *Lane*." J.S.App. 143. In contrast to the "few reports and limited testimony from a handful of witnesses" in those cases, the voluminous 2006 reauthorization record "includes numerous studies by voting rights experts, testimony from dozens of witnesses describing racial discrimination in voting by covered jurisdictions, and hundreds of judicial and Attorney General findings of unconstitutional discrimination against minority voters." J.S.App. 126-127.

The District nonetheless insists that this record is inadequate, arguing that the remedy chosen by Congress—preclearance—can only be justified by evidence that covered jurisdictions are engaging in the same "gamesmanship" practiced before 1965, and that such evidence was lacking in 2006. J.S. 32-35. This argument is untenable.

Contrary to the District's contention (J.S. 32-33), neither *Katzenbach* nor any of this Court's later decisions upholding Section 5 has ever held that evidence of gamesmanship is necessary to sustain Section 5. The

ingenious evasion of federal-court enforcement of the Fifteenth Amendment noted in *Katzenbach* was but one part of a much larger problem—the inadequacy of the case-by-case method to eliminate persistent voting discrimination in jurisdictions where resistance was particularly firmly rooted. *See* 383 U.S. at 313-315, 328; *see also* J.S.App. 128. The District likewise ignores *Rome*, which "found Congress's reauthorization of Section 5 constitutional without ever mentioning stratagems, gamesmanship, or anything of the sort." J.S.App. 130; *see Rome*, 446 U.S. at 178-183. And as Congress found in 2006, "case-by-case enforcement alone is [still] not enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process." H.R. Rep. No. 109-478, at 57.

Moreover, as recounted by the district court, the 2006 record includes evidence of precisely the kind of gamesmanship by covered jurisdictions Appellant posits is necessary to sustain Section 5. *See* J.S.App. 128-131.[6] And, given that the purpose of Section 5 is to prevent discriminatory voting measures from being implemented, it is unsurprising that there is less overt gamesmanship today than in 1965. J.S.App. 132. That Section 5 has reduced but not eliminated overt gamesmanship does not weigh against the statute's constitutionality; if it did, only ineffective remedies could satisfy *Boerne*.

Appellant's other arguments are also unavailing. First, the District emphasizes improvements in regis-

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[6] *See also, e.g.*, 152 Cong. Rec. S7745, S7745-7749 (daily ed. July 18, 2006) (statement of Senator Leahy enumerating several "repeat offender[]" jurisdictions).

tration rates in some covered jurisdictions. J.S. 33. But as noted above, the 2006 record of racial disparities in registration resembles that reviewed in *Rome*. J.S.App. 59-62; p. 26, *supra*.

Second, the District argues that the DOJ objection rate is too low to justify Section 5's reauthorization. J.S. 34. But as the court below explained, "the objection rate has always been low, and the sharpest declines occurred before *City of Rome*." J.S.App. 66. The nature and quantity of the evidence of persistent widespread unconstitutional discrimination in covered jurisdictions—including the more than 600 objections since 1982—is more than adequate to justify Section 5. *See* J.S.App. 66-77; pp. 7-9, 26-29, *supra*.

Finally, the District suggests that only unconstitutional conduct that prevents minorities from registering to vote—not unconstitutional conduct that prevents minorities from participating in the political process—can justify Section 5. J.S. 34-35. That argument likewise conflicts with *Rome*, which upheld Section 5 based on evidence of the latter variety. *See, e.g.*, 446 U.S. at 181-182.[7] In sum, under this Court's well-established precedents, the 2006 record provides robust support for Congress's judgment that Section 5 remains necessary to remedy and deter unconstitutional discrimination against minority voters.

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[7] Appellant argues (J.S. 35-36) that *Katzenbach* and *Rome* do not end the inquiry because those decisions could not have considered the 2006 record. But the district court never suggested otherwise; rather, it relied, appropriately, on *Rome* because the Court there upheld the 1975 reauthorization based upon certain types of evidence, and the 2006 reauthorization's record contains similar types and quantities of evidence.

3. Section 5 appropriately deters and remedies voting discrimination

As the district court explained, under this Court's precedents, the greater the level of scrutiny applicable to a right and the stronger the record of violations, the more deference Congress receives in crafting enforcement schemes. J.S.App. 44, 121 (citing *Hibbs*, *Lane*, *Kimel*, and *Garrett*). Given the rights at stake and the substantial record of violations before Congress in 2006, Section 5 remains a congruent and proportional response to the evil its protections are designed to remedy and prevent—racial discrimination in voting in those jurisdictions where, historically, such unconstitutional conduct has been particularly entrenched.[8]

The numerous steps Congress has taken to limit Section 5's federalism costs confirm that Section 5 is properly designed to prevent and remedy unconstitutional State conduct—and is not an improper effort by Congress to redefine substantive rights. Section 5 is temporary,[9] affects a discrete class of laws and prac-

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[8] Section 5 prohibits voting changes in covered jurisdictions that are purposefully discriminatory (and thus unconstitutional), as well as voting changes that will have a retrogressive effect on voting and political participation by minority citizens. Congress may seek to prevent or remedy unconstitutional discrimination by prohibiting conduct that is discriminatory in effect. *Rome*, 446 U.S. at 173, 175; *see also Boerne*, 521 U.S. at 518.

[9] Like the 1982 reauthorization sustained by this Court in *Lopez*, the 2006 reauthorization extended Section 5 for 25 years. As the district court recognized, the 2006 Congress had good reasons for its "quintessentially legislative judgment" as to the duration of the reauthorization. J.S.App. 117. Congress determined that, because most Section 5 activity occurs during the redistricting that follows each decennial census, a renewal covering only one census cycle would provide jurisdictions with no incentive to make a clean

tices, is confined to jurisdictions where voting discrimination historically has been most pervasive and flagrant, and has an escape hatch from coverage. *Compare Boerne*, 521 U.S. at 532-533. Moreover, unlike most statutes invalidated under the *Boerne* framework, Section 5 includes no provision authorizing recovery of money damages from State treasuries. Section 5 thus plainly is not a substantive entitlement program masquerading as remedial legislation. *See Hibbs*, 538 U.S. at 754-757 (Kennedy, J., dissenting). Rather, Section 5 is a "limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment." *Garrett*, 531 U.S. at 373.

In light of Congress's continued tailoring of the statute in the 2006 reauthorization, it is unsurprising that not a single witness for any governmental entity testified against reauthorization. To the contrary, a coalition of organizations representing the interests of thousands of elected State and local officials advocated for Section 5's reauthorization. *See* 152 Cong. Rec. H5143, H5146 (daily ed. July 13, 2006).

Appellant argues that Section 5 is unduly intrusive on State sovereignty because it requires covered jurisdictions to obtain preclearance for voting changes. J.S. 31-32, 39. But as the Court has explained, "the Reconstruction Amendments by their very nature contemplate some intrusion into areas traditionally reserved to the States," and thus the Court has "specifically upheld the constitutionality of § 5 against a challenge that this

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record that would entitle them to bailout and would provide an insufficient record for a future Congress to evaluate the continued need for Section 5. J.S.App. 116-117, 143.

provision usurps powers reserved to the States." *Lopez*, 525 U.S. at 282-283.

Appellant's challenge to Section 5's coverage formula (J.S. 36-38) is also unavailing. The District misunderstands the role of registration and turnout statistics in establishing which jurisdictions are covered. Congress employed those data as tools for identifying jurisdictions with particularly egregious histories of discrimination, where especially forceful measures against voting discrimination were deemed necessary. *See Boerne*, 521 U.S. at 532-533. In 2006, as in every prior reauthorization, Congress determined, following a review of the evidence of continuing discrimination in those covered jurisdictions, that Section 5 remained necessary to remedy and deter unconstitutional conduct in them.

This Court, moreover, has already rejected the District's contention (J.S. 38) that Congress was required to adjust its coverage formula based on a comparison between covered and non-covered jurisdictions. *See Katzenbach*, 383 U.S. at 330-331; *see also Rome*, 446 U.S. at 180-182 (upholding Section 5 based exclusively on evidence of ongoing discrimination in covered jurisdictions). In any event, Congress in enacting the VRARA received evidence showing that the differences between covered and non-covered jurisdictions were significant, and that discrimination remains an especially salient problem in covered jurisdictions. *See* J.S.App. 138 (describing this evidence). The District's challenge ignores this evidence, as well as the role of the Act's bailout and bail-in mechanisms. These mechanisms allow for the contraction and expansion of coverage to ensure that Section 5 coverage continues to be reasonably tailored to those jurisdictions where racial discrimination has been particularly entrenched.

CONCLUSION

The district court's comprehensive opinion leaves no doubt that (a) Appellant is not eligible to bail out of coverage under Section 5, and (b) Section 5 remains valid as a measure designed by Congress to remedy a long history of unconstitutional discrimination in voting in covered jurisdictions, including Texas, and to prevent the recurrence of such discrimination. Those conclusions follow inexorably from four decades of this Court's decisions examining Section 5, and from the substantial record of ongoing discrimination reviewed by Congress in 2006. Appellant's submission fails to show that the district court's decision is flawed in either its application of this Court's precedents or its analysis of the legislative record. Accordingly, the judgment of the district court should be summarily affirmed.

Respectfully submitted.

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No. 08-322

In the Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, APPELLANT

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether appellant, a municipal utility district, is statutorily eligible to bail out of coverage under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether Congress permissibly exercised its authority under the Fifteenth Amendment when it reauthorized Section 5 in 2006 after determining that covered jurisdictions continue to discriminate against minority voters and that Section 5 remains effective in preventing and remedying such discrimination.

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In the Supreme Court of the United States

No. 08-322

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, APPELLANT

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1-183) is reported at 573 F. Supp. 2d 221.

JURISDICTION

The judgment of the district court was entered on May 30, 2008 (J.S. App. 184-185). A notice of appeal was filed on July 8, 2008 (J.S. App. 186-192), and the jurisdictional statement was filed on September 8, 2008. The jurisdiction of this Court is invoked under 42 U.S.C. 1973b(a)(5) and 28 U.S.C. 1253.

STATEMENT

1. Congress enacted the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973 *et seq.*, in order "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for

nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Section 2 of the VRA, 42 U.S.C. 1973, sets out a basic prohibition on discrimination: It makes it unlawful for any State to impose a "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. 1973(a).

This case concerns Section 5 of the VRA, 42 U.S.C. 1973c, which provides that "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect" on its coverage date, it must first obtain administrative or judicial preclearance. *Ibid.* A covered jurisdiction may seek administrative preclearance for a voting change by applying to the Attorney General. *Ibid.* Alternatively, a jurisdiction may seek judicial preclearance by bringing a declaratory-judgment action in the United States District Court for the District of Columbia. *Ibid.* In either case, preclearance may be granted only if the jurisdiction demonstrates that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. *Ibid.*

Like several other provisions of the VRA, Section 5 is limited both geographically and temporally, and it applies only to "areas where voting discrimination has been most flagrant." *Katzenbach*, 383 U.S. at 315. Specifically, Section 5 applies only to "covered jurisdictions," which were originally defined as those jurisdictions that, as of November 1, 1964, employed a "test or device" to restrict voting (such as a literacy test), and in

which fewer than 50% of voting-age residents were registered to vote as of that date or actually voted in the presidential election that year. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 438; see 28 C.F.R. Pt. 51 App. (listing covered jurisdictions). In 1975, Congress amended the coverage formula to include jurisdictions with a demonstrated history of discrimination against language-minority voters. See Act of Aug. 6, 1975 (1975 Amendments), Pub. L. No. 94-73, §§ 201 *et seq.*, 89 Stat. 400.

Since its enactment, the VRA has included a mechanism under which certain jurisdictions covered by Section 5 may bring a declaratory-judgment action in the District Court for the District of Columbia in order to terminate their coverage. See VRA § 4(a), 79 Stat. 438. Congress has reviewed and amended that "bailout" mechanism on various occasions. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 315; 1975 Amendments § 101, 89 Stat. 400; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006 Reauthorization), Pub. L. No. 109-246, § 5, 120 Stat. 580. The current "bailout" provision permits certain covered jurisdictions, including political subdivisions, to escape Section 5 coverage if they can demonstrate that they have not discriminated against minority voters during the previous ten years. 42 U.S.C. 1973b(a). The VRA defines a "political subdivision" to be "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. 1973*l*(c)(2).

Congress most recently reexamined the VRA in 2006. It found that, as "a direct result of" the VRA, "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters." 2006 Reauthorization § 2(b)(1), 120 Stat. 577. Nevertheless, "vestiges of discrimination in voting continue to exist," and in the absence of continued enforcement of Section 5, "racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their vote diluted, undermining the significant gains made by minorities in the last 40 years." § 2(b)(2) and (9), 120 Stat. 577, 578. Congress therefore reauthorized Section 5, but it enacted a sunset clause that will eliminate Section 5 coverage in 25 years. § 4, 120 Stat. 580.

2. Appellant is a municipal utility district in Travis County, Texas, that conducts elections to select the members of its board of directors. J.S. App. 18. Because the State of Texas is a covered jurisdiction, appellant is subject to the preclearance requirements of Section 5. See 28 C.F.R. Pt. 51 App.; 28 C.F.R. 51.6.

Eight days after Congress reauthorized Section 5 in 2006, appellant brought this action in the United States District Court for the District of Columbia, seeking permission to bail out of coverage under Section 5, or, in the alternative, a declaration that Section 5 is unconstitutional. J.S. App. 19. As required by 42 U.S.C. 1973b(a)(5), a three-judge district court was convened to hear appellant's claims. Several individuals and entities intervened as defendants in the case, and the parties filed cross-motions for summary judgment. J.S. App. 19-20.

3. After hearing oral argument, the three-judge district court granted summary judgment to appellees.

J.S. App. 1-183. The court first rejected appellant's claim that it was statutorily eligible to bail out of Section 5 coverage. *Id.* at 20-30. The court noted that only States and their "political subdivisions" may seek bail-out, and it determined that the statutory definition of the term "political subdivisions" includes only counties or other local governmental entities that conduct voter registration when counties do not. *Id.* at 21; see 42 U.S.C. 1973c. Since appellant is not a county and the county conducts voter registration, J.S. App. 22, the court determined that it could not bail out of Section 5 coverage.

The district court then considered appellant's argument that Congress exceeded its constitutional authority when it reauthorized Section 5. J.S. App. 30-153. The court found at the outset that this challenge was essentially facial in nature as raised in this case. *Id.* at 31-32, 144. The court then recognized that this Court "has articulated two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments." *Id.* at 32. In *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997), the Court held that when Congress exercises its authority to enforce the Fourteenth Amendment, see U.S. Const. Amend. XIV, § 5, there must be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." And in *Katzenbach*, the Court set out a more deferential standard for evaluating Congress's exercise of its Fifteenth Amendment authority to protect voting rights: "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." 383 U.S. at 324; accord *Lopez* v. *Monterey County*, 525 U.S. 266, 283 (1999); see U.S. Const. Amend. XV, § 2.

The district court concluded that *Katzenbach* provided the appropriate standard for evaluating the continuing validity of Section 5. J.S. App. 45. After engaging in a thorough review of the "massive amount of evidence Congress collected," the court stated that there was "no doubt that despite the 'undeniable' political progress made by minorities, 'Congress could rationally have concluded' that it was necessary to extend section 5." *Id.* at 118 (quoting *City of Rome* v. *United States*, 446 U.S. 156, 177, 181 (1980)). The court went on to determine that, under the *City of Boerne* congruence-and-proportionality standard, Congress had acted within its constitutional authority as well when it reauthorized Section 5. *Id.* at 118-144.

ARGUMENT

The constitutionality and scope of Section 5 of the VRA is undeniably important, but the three-judge district court's unanimous, correct, and careful disposition of the questions presented does not warrant plenary review here. The district court's conclusion that appellant is not statutorily eligible to terminate its Section 5 coverage is mandated by the text and history of the VRA's bailout provision as well as the Attorney General's longstanding interpretation of that provision. The court's determination that Congress acted within its constitutional authority when it reauthorized Section 5 in 2006 is also correct. Congress collected extensive evidence demonstrating that discrimination against minority voters continues to exist in covered jurisdictions and that Section 5 remains an effective means of preventing, deterring, and remedying that discrimination. Congress's factual findings are entitled to substantial deference, see *Turner Broad. Sys.* v. *FCC*, 520 U.S. 180,

195-196 (1997), and the three-judge district court carefully reviewed and upheld those findings. The facial nature of appellant's attacks on the constitutionality of Section 5 (see J.S. App. 31-32) also increases the burden that appellant shoulders in seeking to invalidate Section 5 and reinforces the validity of the district court's conclusion in this case. Accordingly, this Court should summarily affirm the judgment of the district court.

A. Appellant Is Statutorily Ineligible To Bail Out Of Section 5 Coverage

1. Section 4(a) of the VRA, 42 U.S.C. 1973b(a), permits three types of jurisdictions to bail out of Section 5 coverage: (1) States designated for coverage in their entirety under the Act's coverage formula, (2) counties separately designated for coverage, and (3) "any political subdivision of [a covered] State * * * though such [coverage] determinations were not made with respect to such subdivision as a separate unit." 42 U.S.C. 1973b(a)(1). Appellant insists (J.S. 10-23) that it is a "political subdivision" of Texas and therefore qualifies under the third component of the bailout provision. That is incorrect. Section 14(c)(2) of the VRA defines the phrase "political subdivision" to be "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. 1973*l*(c)(2). Appellant admits (J.S. 6-7) that it is not a county or a parish and that the county conducts voter registration. Appellant therefore is not a "political subdivision," and the district court correctly held that it is ineligible to seek bailout. J.S. App. 20-30.

Appellant claims (J.S. 11) that the VRA's statutory definition of "political subdivision" does not apply to Section 4(a) because, in its view, the definition is "relevant only to determining which jurisdictions may be targeted for separate coverage." Appellant offers no textual support for that view, and it is inconsistent with the settled rule that, when a statute specifically defines a particular term, that definition is controlling for purposes of that statute. See *Burgess* v. *United States*, 128 S. Ct. 1572, 1577 (2008).

2. The text of the VRA unambiguously compels the district court's interpretation, and there is accordingly no need to proceed further. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119 (2001). But in any event, the legislative history reinforces what is apparent from the VRA's plain language. As originally enacted, the VRA permitted only two types of jurisdictions to bail out of Section 5 coverage: States designated for coverage in their entirety, and counties separately designated for coverage. VRA § 4(a), 79 Stat. 438. In 1982, Congress amended the bailout provision by expanding the substantive standard for bailout and by expanding the number of jurisdictions eligible to apply for a bailout to include "political subdivisions" within wholly covered States. 42 U.S.C. 1973b(a).

The legislative history of the 1982 amendments confirms that the newly added category of jurisdictions eligible to apply for bailout includes only jurisdictions in fully covered States that satisfy Section 14(c)(2)'s definition of "political subdivision." The committee reports explained that "[t]he standard for bail-out is broadened to permit political subdivisions, *as defined in Section 14(c)(2)*, in covered states to seek bail out although the state itself may remain covered." H.R. Rep. No. 227,

97th Cong., 1st Sess. 2 (1981) (*1981 House Report*) (emphasis added); accord S. Rep. No. 417, 97th Cong., 2d Sess. 2 (1982) (*1982 Senate Report*). The committees consistently described the jurisdictions newly eligible to seek bailout as "counties" in fully covered States, see *1981 House Report* 32; *1982 Senate Report* 44; *id.* at 45, 57, 60, and contemplated that jurisdictions smaller than counties could seek bailout only when counties did not conduct voter registration, see *1981 House Report* 39; *1982 Senate Report* 69. Indeed, the reports explained that Congress had specifically decided not to permit jurisdictions smaller than counties to bail out because of the burden that could result from the filing of thousands of such cases. See *1982 Senate Report* 57 n.192 ("Towns and cities within counties may not bailout separately" because, "[a]s a practical matter * * * we could not expect that the Justice Department or private groups could remotely hope to monitor and to defend the bailout suits."); see *id. at* 69; *1981 House Report* 41.

Appellant attempts (J.S. 16 n.3) to dismiss the 1982 legislative history as "inconclusive," and it notes (J.S. 17) that a few general passages in the 1982 legislative history and the subsequent 2006 legislative record suggested that bailout was encouraged. As the district court noted, however, none of the passages cited by appellant "even hints that political subdivisions outside section 14(c)(2)'s definition would qualify for bailout." J.S. App. 26. There is no reason to depart from the statute's plain language.

3. The district court's interpretation of Section 4(a) is also consistent with regulations adopted by the Attorney General to implement the VRA. Those regulations provide that, aside from fully covered States and separately covered counties, only "political subdivisions" as

defined in Section 14(c)(2) of the Act within fully covered States may apply for bailout. 28 C.F.R. 51.2, 51.5. The regulations reflect an interpretation of the statute that is entitled to "substantial deference." *Lopez*, 525 U.S. at 281. Moreover, Congress was aware of the Attorney General's interpretation of Section 4(a) when it reauthorized the VRA in 2006, yet it made no change to that portion of the statute. J.S. App. 27-28. In reauthorizing the VRA, Congress should be presumed to have been aware of and endorsed the existing administrative interpretation that bailout is limited to States, counties, and statutorily defined "political subdivisions." See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

4. In support of its argument that this Court should ignore the statutory definition of "political subdivision," appellant principally relies (J.S. 12-14) on this Court's decisions in *United States* v. *Board of Commissioners*, 435 U.S. 110 (1978) (*Sheffield*), and *Dougherty County Board of Education* v. *White*, 439 U.S. 32 (1978) (*Dougherty County*). Neither case dealt with the bailout provision at all, let alone held that the definition of "political subdivision" in Section 14(c)(2) does not apply to the portion of the statute governing bailout. Moreover, as explained above, the relevant portion of Section 4(a) was not even added to the statute until 1982, four years after those cases were decided. Thus, the cases shed no light on the question presented here.

In both *Sheffield* and *Dougherty County*, the Court considered the extent to which jurisdictions located within fully covered States are subject to the preclearance requirement of Section 5. Section 5 requires any covered "State or political subdivision" to preclear all changes affecting voting, 42 U.S.C. 1973c, and the defendant jurisdiction in each case argued that it was nei-

ther a "State" nor a "political subdivision." *Sheffield*, 435 U.S. at 117; *Dougherty County*, 439 U.S. at 43-44. The Court in *Sheffield* rejected that argument but *not*, as appellant suggests (J.S. 12-13), based on a conclusion that Section 14(c)(2)'s definition of "political subdivision" did not apply to Section 5. Instead, for purposes of establishing Section 5's coverage, the Court held that the term "State," as used in Section 5, "includes political units within it." 435 U.S. at 127; see *id.* at 129 n.17 ("We believe that the term 'State' can bear a meaning that includes all state actors within it."). Indeed, the Court emphasized that "the meaning of the term 'political subdivision' has no operative significance" for that purpose, because "the only question is the meaning of '[designated] State.'" *Id.* at 126 (alteration in original). The Court in *Dougherty County* held the same. 439 U.S. at 44.

Appellant places almost the full weight of its argument on the *Sheffield* Court's passing comment that "Congress's exclusive objective in § 14(c)(2) was to limit the jurisdictions which may be separately designated for coverage under § 4(b)." 435 U.S. at 130 n.18. That statement was dictum because, as noted above, the Court made clear that the meaning of the term "political subdivision" was irrelevant to its holding. Moreover, as the Court observed in *City of Rome*, *Sheffield* "did not even discuss the bailout process" and "did not hold that cities * * * are 'political subdivisions.'" *City of Rome*, 446 U.S. at 167-169 & n.5. In any event, the statement in *Sheffield* cannot be read to preclude the application of Section 14(c)(2) to statutory provisions that did not even exist at the time.

Finally, appellant insists (J.S. 12-23) that the Court must interpret Section 4(a) to permit jurisdictions

smaller than counties to apply for bailout or risk imperiling the constitutionality of Section 5. The canon of constitutional avoidance "has no application in the absence of statutory ambiguity," and, as explained above, Section 4(a) is not ambiguous. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001). In any event, reading the statute according to its terms does not raise a serious constitutional question. See pp. 25-27, *infra*.

B. Section 5 Is Constitutional

This Court has upheld the constitutionality of Section 5 on four separate occasions. *Lopez*, 525 U.S. at 282-285; *City of Rome*, 446 U.S. at 177-178; *Georgia* v. *United States*, 411 U.S. 526, 535 (1973); *Katzenbach*, 383 U.S. at 308, 337. When it reauthorized Section 5 in 2006, Congress relied on the same types of evidence establishing the need for the legislation that previous Congresses had relied on in enacting and reauthorizing Section 5 evidence examined and approved by this Court in *Katzenbach* and *City of Rome*. Based on its extensive investigation into the state of voting rights in covered jurisdictions and throughout the country, Congress determined that Section 5 has been effective at preventing, remedying, and deterring some voting discrimination, finding: "Significant progress has been made in eliminating first generation barriers experienced by minority voters," and "[t]his progress is the direct result of the" VRA. 2006 Reauthorization § 2(b)(1), 120 Stat. 577. At the same time, however, Congress also found that, "[d]espite the progress made by minorities under the [VRA], the evidence before Congress reveals that 40 years has not been a sufficient amount of time to elimi-

nate the vestiges of discrimination following nearly 100 years of disregard." § 2(b)(7), 120 Stat. 578.

Based on its meticulous review of the factual record, the three-judge district court correctly held that, under either the *Katzenbach* or the *City of Boerne* standard, the reauthorization of Section 5 was a permissible exercise of Congress's authority under the Fifteenth Amendment and therefore is constitutional on its face. J.S. App. 45. Appellant argues (J.S. 24-25) that this Court should grant plenary review to clarify which of those legal standards courts should use in evaluating Congress's exercise of its Fifteenth Amendment authority. That issue does not warrant this Court's review here, however, because the three-judge district court correctly determined that the reauthorization of Section 5 was constitutional under either the *City of Boerne* standard urged by appellant or *Katzenbach*'s rationality standard. J.S. App. 118-153. The three-judge district court's unanimous upholding of Congress's fact findings, which themselves are entitled to substantial deference, see *Turner Broad. Sys.*, 520 U.S. at 195-196, does not warrant plenary review. Cf. *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

1. The *City of Boerne* standard requires "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. at 520. The first step in that analysis is "to identify with some precision the scope of the constitutional right at issue." *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001). Section 5 was enacted as part of an effort to protect the right of all citizens to vote without discrimination on the basis of race or membership in a language minority group. This Court has repeatedly held that the right to vote is "fun-

damental" and is "preservative of all rights." *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886)). For that reason, classifications affecting the right to vote are subject to strict scrutiny. See *Dunn* v. *Blumstein*, 405 U.S. 330, 337 (1972). And of course all governmental classifications on the basis of race, including any such classifications that deprive individuals of their right to vote, are also subject to strict scrutiny. See, *e.g.*, *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-482 (1997).

In applying the *City of Boerne* standard, this Court has recognized that where, as here, Congress targets conduct that is subject to heightened constitutional scrutiny, it is "easier for Congress to show a pattern of state constitutional violations," and therefore Congress has greater flexibility in crafting appropriate remedies. *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 736 (2003); *Tennessee* v. *Lane*, 541 U.S. 509, 528-529 (2004); see *id.* at 564 (Scalia, J., dissenting) ("[C]ongressional measures designed to remedy racial discrimination by the States" are reviewed under a "permissive" standard.). As explained below, Congress amassed abundant evidence of constitutional violations, and it crafted a remedy that is congruent and proportional to those violations.

2. Before reauthorizing Section 5, Congress conducted an extensive investigation into the operation of the Voting Rights Act over the previous 40 years. Congress held 22 separate hearings, heard from 86 witnesses, and gathered tens of thousands of pages of evidence. See H.R. Rep. No. 478, 109th Cong., 2d Sess. 5, 11 (2006) (*2006 House Report*); S. Rep. No. 295, 109th Cong., 2d Sess. 2-4 (2006). Realizing that Section 5 had

been in operation for several decades, Congress examined not only the degree to which discrimination against minority voters persists in covered jurisdictions, but also the extent to which Section 5 has been effective at remedying, preventing, and deterring such discrimination. Although Congress recognized that "[s]ubstantial progress has been made" and that "[d]iscrimination today is more subtle than the visible methods used in 1965," it also found that discrimination continues to result in "a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice." *2006 House Report* 6. Those findings are amply supported by the record before Congress and are entitled to respect.

a. As detailed in the district court's thorough opinion, Congress found that covered jurisdictions continue to adopt, employ, and perpetuate techniques to suppress and dilute the vote of minority citizens. The record includes evidence of discrimination throughout covered jurisdictions perpetrated at every level of government. For example, since 1982, the Attorney General has interposed more than 750 Section 5 objections to more than 2400 proposed voting changes based on findings that those changes were discriminatory.* In response to the Attorney General's request for more information from jurisdictions submitting changes, an additional

* These totals include the number of objections interposed by the Attorney General as well as the number of denials of judicial preclearance by the District Court for the District of Columbia. The Department of Justice tracks the number of individual changes objected to in each objection letter. See *2006 House Report* 21-22; *id.* at 36. A list of the Attorney General's objections can be found at Civil Rights Div., U.S. Dep't of Justice, *About Section 5 of the Voting Rights Act* (visited Nov. 26, 2008) <http://www.usdoj.gov/crt/voting/sec_5/obj_activ.php>.

1100 proposed changes have been abandoned or modified an outcome that is "often illustrative of a jurisdiction's motives." *2006 House Report* 40; see J.S. App. 81-83; *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 219 (2006) (statement of Luis Ricardo Fraga & Maria Lizet Ocampo, Stanford Univ.).

The Department of Justice has sent thousands of election observers to monitor more than 750 elections in covered jurisdictions based on findings that there is a risk of discrimination against minority voters in those jurisdictions. J.S. App. 103-106; *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. 13 (2006) (*Evidence of Continued Need*) (statement of Bill Lann Lee, Chair, Nat'l Comm'n on the VRA); *id.* at 124 (statement of the Nat'l Comm'n on the VRA). In covered States, plaintiffs have been successful in more than 650 lawsuits under Section 2 of the VRA that is, lawsuits in which they have shown "a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. 1973(a); see J.S. App. 95; *Evidence of Continued Need* 125-126. Racially polarized voting has continued to pervade elections in covered jurisdictions, and it is more prevalent there than in non-covered jurisdictions. J.S. App. 106-108. Finally, significant gaps in registration rates between minority citizens and white citizens continue to exist in some covered jurisdictions. J.S. App. 59-63; *2006 House Report* 25-34.

Beyond the quantitative evidence, Congress also gathered thousands of pages of testimony and docu-

ments from citizens, advocates, and officials chronicling the ongoing problems of vote suppression, voter intimidation, and vote dilution throughout covered jurisdictions. Examples of vote suppression and voter intimidation presented to Congress in 2006 included several instances of minority voters' being threatened with arrest or prosecution for voting, *Evidence of Continued Need* 3619-3620, 3979 (statements from reports of Nat'l Comm'n on the VRA), poll workers' telling language-minority voters that they should not be voting if they do not speak English, *id.* at 350, 3980 (statements from reports of Nat'l Comm'n on the VRA), large-scale efforts to challenge minority voters' registration, *id.* at 93-94 (statement of Joe Rogers, Nat'l Comm'n on the VRA), and misinformation campaigns designed to prevent minority voters from getting to the polls, *id.* at 3548 (statement from report of Nat'l Comm'n on the VRA). Examples of vote dilution included the adoption and implementation of techniques such as dilutive redistricting plans, discriminatory annexations, anti-single-shot rules, majority run-off requirements, and at-large election systems. *Id.* at 20 (statement of Nadine Strossen, President, ACLU); *id.* at 123 (statement from report of Nat'l Comm'n on the VRA).

Based on the evidence it collected, Congress concluded that, although measurable progress has been made towards eliminating discrimination against minority voters in covered jurisdictions, that progress is largely attributable to the enforcement of Section 5, combined with Section 5's significant deterrent effect. *2006 House Report* 21-24. In other words, Congress found reliable evidence that Section 5 has been working. But it also determined that some progress was not enough. Section 5 was enacted "to rid the country of

racial discrimination in voting," *Katzenbach*, 383 U.S. at 315, not merely "to reduce racial discrimination in voting to what some view as a tolerable level," 152 Cong. Rec. S7976 (daily ed. July 20, 2006) (statement of Sen. Feingold). As it had with prior reauthorizations, moreover, Congress concluded that further enforcement of Section 5 is necessary in order to preserve the fragile gains that minority voters have made. See *2006 House Report* 57; see also *City of Rome*, 446 U.S. at 181-182.

b. Appellant's principal attack on the adequacy of the legislative record is its claim that Congress erred in focusing on evidence of ongoing discrimination against minority voters in covered jurisdictions. Appellant asserts (J.S. 33) that Congress enacted Section 5 for the sole purpose of preventing covered jurisdictions from engaging in "gamesmanship" whereby they used changes in voting practices to evade judgments invalidating earlier practices. According to appellant (J.S. 32-34), the only type of evidence that could be relevant to Congress's decision to reauthorize Section 5 would be evidence that covered jurisdictions continue to engage in such gamesmanship. Both the factual and the legal premises of that argument are flawed.

As an initial matter, it is not true that Congress enacted Section 5's preclearance mechanism solely in response to gamesmanship by covered jurisdictions. J.S. App. 128-130. Although this Court recognized in *Katzenbach* that "some" covered States had engaged in such behavior, 383 U.S. at 314, 335, the Court repeatedly stated that it was the cumbersome nature of case-by-case adjudication of voting cases that prompted Congress to adopt the preclearance mechanism, *id.* at 314, 327-328. In other words, the propensity of some States covered by Section 5 to engage in the type of games-

manship described by appellant was only one aspect of the larger failure of traditional legislative bans on discrimination in voting. See *id.* at 313-314 (reviewing Congress's multiple previous failed efforts to "cope with the problem by facilitating case-by-case litigation against voting discrimination"); cf. *Lane*, 541 U.S. at 526 (reviewing failed prior legislative attempts to address disability discrimination).

In any event, even if appellant were correct that Section 5 was enacted primarily to target gamesmanship by covered jurisdictions, appellant's argument overlooks that Section 5's preclearance mechanism removes the opportunity for covered jurisdictions to continue to engage in such behavior. Although Congress did find evidence of some attempts by covered jurisdictions to evade the nondiscrimination mandate of Section 5, J.S. App. 131, the limited evidence of gamesmanship simply demonstrates that Section 5 has been doing its job. Congress need not demonstrate the ineffectiveness of its chosen remedy before it may continue to employ that remedy to address ongoing discrimination. *Id.* at 128-132.

c. Appellant also offers three specific challenges to the evidence relied upon by Congress, describing the rate of Section 5 objections as "vanishingly small" (J.S. 30), questioning Congress's concern with the prevalence of racially polarized voting (J.S. 34), and complaining that Congress relied too much on "second generation" barriers to full minority participation (J.S. 35). The district court properly concluded that those challenges lack merit.

First, although the Attorney General has objected to a relatively low *percentage* of preclearance requests, that has always been the case. The district court found

that the overall trend throughout the life of Section 5 has been a declining rate of objections, J.S. App. 64-67, but that observation is entirely consistent with Congress's conclusion that Section 5 has been successful at deterring efforts to discriminate against minority voters. It does not prove that there is no longer a need for Section 5's deterrent effect. See *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 66 (2005) (*Impact and Effectiveness*) (statement of Joseph D. Rich, Lawyers' Comm. for Civil Rights Under Law) ("[T]he most important impact of Section 5 is its deterrent effect on discriminatory voting changes.").

Moreover, the percentage of preclearance requests that draw objections does not paint a complete picture. Over the years, the Attorney General has interposed hundreds upon hundreds of objections to a wide variety of voting changes, including annexations, education requirements, election dates, polling locations, majority vote requirements, statewide and local redistricting, staggered terms, and numbered posts. *Evidence of Continued Need* 402-404 (statement from report of Voting Rights Project, ACLU); see *id.* at 335 (statement from report of Nat'l Comm'n on the VRA); *Voting Rights Act: Section 5 of the Act History, Scope, & Purpose: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 1696-2595 (2005) (*History, Scope, & Purpose*) (correspondence from Civil Rights Div., U.S. Dep't of Justice). Since 1982, the Attorney General has interposed an objection to at least one statewide redistricting plan in every fully covered State and in most partially covered States. In Louisiana, for instance,

"since 1965, not one single Louisiana State House of Representatives redistricting plan as initially submitted to the Justice Department for review, has been precleared." *Impact and Effectiveness* 16 (statement of Marc Morial, President, Nat'l Urban League).

Significantly, Congress determined that many objections reflected the Attorney General's finding that a jurisdiction had acted with a discriminatory purpose or with the specific intent to limit minority voting strength. J.S. App. 76-81, 155-183. Between 1980 and 2000, the Attorney General interposed 421 objections based wholly or partially on discriminatory intent. *Id.* at 76-77; see *id.* at 155-183 (appendix to district court's opinion setting out examples of such objection letters). One recent study of Section 5 objections found a "consistent increase over time of objections based on the purpose prong." Peyton McCrary et al., *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 Mich. J. Race & Law 275, 297 (2006). Such purposeful discrimination is at the core of the Fifteenth Amendment prohibition. See *Bossier Parish Sch. Bd.*, 520 U.S. at 481.

Second, appellant dismisses (J.S. 34) Congress's finding that racially polarized voting persists at a high rate throughout covered jurisdictions. According to appellant, because racial polarization is not state action, it is not properly the target of Congress's authority to enforce the Fifteenth Amendment. Appellant misunderstands the significance of Congress's finding. As the district court explained, racially polarized voting is a necessary precondition for vote dilution techniques to have their intended discriminatory effect. J.S. App. 106. Thus, Congress's finding that racial bloc voting contin-

ues throughout covered jurisdictions bolsters its determination that Section 5 continues to be needed.

Third, in dismissing Congress's reliance on evidence of second-generation barriers to full participation by minority voters, appellant ignores the history of voting discrimination in the United States. Throughout the life of Section 5, Congress has found that, as first-generation barriers to registration and participation began to fall away, second-generation barriers to minority voters' fair opportunity to elect the candidates of their choice arose in order to counteract the gains minority voters had made. See, *e.g.*, H.R. Rep. No. 397, 91st Cong., 1st Sess. 7 (1969); S. Rep. No. 295, 94th Cong., 1st Sess. 27-28 (1975); H.R. Rep. No. 196, 94th Cong., 1st Sess. 18-19 (1975); *1981 House Report* 17-18; *1982 Senate Report* 6-7. Congress's conclusion in 2006 that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process" is consistent with the conclusions of every previous Congress to reauthorize Section 5. 2006 Reauthorization § 2(b)(2), 120 Stat. 577. Appellant offers no reason why such barriers should not be of concern to Congress. Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 342 (1960) (explaining that the Fifteenth Amendment prohibits "sophisticated as well as simple-minded modes of discrimination") (quoting *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939)).

3. As the district court found, Section 5 has several limiting features that ensure its congruence and proportionality to the constitutional violations identified by Congress. J.S. App. 133-143. Indeed, in recent years, this Court itself has held up Section 5 as the epitome of congruence and proportionality. See, *e.g.*, *Lane*, 541

U.S. at 519 n.4; *Hibbs*, 538 U.S. at 737-738; *Garrett*, 531 U.S. at 373; *City of Boerne*, 521 U.S. at 526. Three of Section 5's limits are particularly significant: (1) Section 5 covers only those jurisdictions with the worst records of discrimination; (2) jurisdictions may escape coverage if they can demonstrate that they no longer discriminate against minority voters; and (3) Section 5 contains an expiration date.

a. Congress specifically limited Section 5's coverage to target only those jurisdictions with the worst records of unconstitutionally disenfranchising minority citizens. This Court upheld the statute's original coverage formula in *Katzenbach*, 383 U.S. at 328-333, and upheld the statute as amended in 1975 in *City of Rome*, 446 U.S. at 173-178, 180-182; see *Lopez*, 525 U.S. at 283-284. Congress was justified in continuing to rely on the coverage determinations made between 1965 and 1975 after finding, based on reliable evidence, that discrimination in voting against racial and language minority citizens continues in covered jurisdictions.

Appellant takes aim at Congress's decision not to amend the coverage formula, claiming (J.S. 37) that the scope of Section 5 coverage "bears no more meaningful relationship to the problem of voting discrimination as it existed in 2006 than if Congress had decided covered jurisdictions by playing pin-the-tail-on-the-donkey." That assertion ignores the historical context that led to Section 5's adoption. Congress chose to cover particular jurisdictions based on their extensive records of discriminating against minority voters. In developing the original coverage formula in 1965, Congress first examined the problem of voting discrimination in the country and found the worst records of such discrimination in a number of southern States. S. Rep. No. 162, 89th Cong.,

1st Sess. Pt. 3, at 13-14 (1965). Congress determined that those jurisdictions "share[d] two characteristics * * * : the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." *Katzenbach*, 383 U.S. at 330. Congress extracted those two objective indicia of discrimination and used them to craft the coverage formula. When Congress extended the reach of Section 5 in 1975 to protect language minority voters, it employed the same method, first identifying the worst offenders and then adjusting the coverage formula to describe elements of the offenders' behavior.

In order to fine-tune the coverage formula, Congress took careful measures to ensure that Section 5's coverage would be neither underinclusive nor overinclusive. Section 3(c) permits the Attorney General or any "aggrieved person" to ask a federal court to determine that a jurisdiction not covered by Section 5 be subject to the same preclearance requirement upon a showing of sufficient violations of the Fourteenth and Fifteenth Amendments. 42 U.S.C. 1973a(c). Conversely, as explained below, Section 4(a) of the VRA permits qualifying jurisdictions to seek termination of their coverage in certain circumstances.

Moreover, contrary to appellant's assertion (J.S. 38), Congress did "engage in [a] meaningful comparison between covered and noncovered jurisdictions," and the evidence it amassed confirms that, even today, there is more voting discrimination in covered jurisdictions. For example, Congress examined a study of reported Section 2 lawsuits filed throughout the country between 1982 and 2005. *Evidence of Continued Need* 125-126, 202-204 (statements from report of the Nat'l Comm'n on the VRA). The study revealed that 57% of the cases

with outcomes favorable to minority voters were filed in jurisdictions covered by Section 5, even though those jurisdictions had less than one-quarter of the nation's population. *Id.* at 125-126, 202-203 (statements from report of the Nat'l Comm'n on the VRA). Thus, covered jurisdictions were subject to more than twice their proportional share of successful Section 2 suits, notwithstanding 30 or 40 years of close monitoring of those jurisdictions by the Attorney General through Section 5. Testimony also indicated that racial bloc voting is more prevalent and severe in covered jurisdictions than in non-covered jurisdictions. *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 48 (2006) (statement of Anita S. Earls, Univ. of N.C.).

b. The bailout provision in Section 4(a) of the VRA further ensures the statute's congruence and proportionality. That provision permits a qualified jurisdiction to terminate Section 5 coverage if it has eliminated discrimination in voting within its boundaries over the previous ten years. See 42 U.S.C. 1973b(a). As Congress heard in testimony relating to the 2006 reauthorization, the criteria required to earn a bailout "go exactly to the issues that Congress was concerned about when it enacted the Voting Rights Act in the first place." *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 104 (2005) (statement of J. Gerald Hebert, former Acting Chief, Civil Rights Div., U.S. Dep't of Justice).

Appellant's claim (J.S. 40) that the current bailout standard is now "illusory" rather than providing what this "Court has previously viewed as a critical safety

valve" does not account for the evolution of the bailout standard. Since the enactment of the VRA, this Court has highlighted the bailout mechanism as an important aspect of Section 5's constitutionality. See *City of Boerne*, 521 U.S. at 533; *Briscoe* v. *Bell*, 423 U.S. 404, 411 (1977); *Katzenbach*, 383 U.S. at 331. But the legitimacy and importance of the statute's bailout mechanism does not now hinge and has not ever hinged on the ability of *every* covered jurisdiction to seek to bail out of coverage. Between 1965 and 1982, only jurisdictions that had been specifically designated by the Attorney General and the Director of the Census as falling under the coverage formula of Section 4(b) were eligible to seek bailout a considerably stricter standard than that faced by covered jurisdictions today. VRA § 4(b), 79 Stat. 438. Nevertheless, this Court twice upheld the statute during those years, even against challenge from a plaintiff that was not eligible to seek a bailout. *City of Rome*, 446 U.S. at 167-169; *Katzenbach*, 383 U.S. at 332. Thus, contrary to appellant's claim that today's bailout option is less permissive than that upheld by this Court in *Katzenbach* and *City of Rome*, the current bailout mechanism is open to considerably more covered jurisdictions than the previous mechanism approved by this Court.

In addition, the substantive bailout standard is substantially more permissive than it was before 1982. Under the original version of the statute, the only jurisdictions that could successfully bail out of coverage were those that could demonstrate that they should not have been covered in the first place. VRA § 4(b), 79 Stat. 438; see *Katzenbach*, 383 U.S. at 331-333. Under the current standard, however, jurisdictions eligible to seek bailout may do so if they can demonstrate that they have

changed their discriminatory practices in the previous ten years. 42 U.S.C. 1973b(a). By expanding the standard, Congress sought to create "an incentive" for covered jurisdictions to "eliminate practices denying or abridging opportunities for minorities to participate in the political process" and to "do more than simply maintain a status quo that grandfathered in pre-1965 elections laws and practices that were discriminatory." *1982 Senate Report* 46, 59. Appellant makes no effort to explain how the bailout standard available to jurisdictions now could imperil the congruence and proportionality of Section 5 while the considerably stricter pre-1982 bailout standard was held to enhance the statute's constitutionality.

c. Finally, Section 5 has always had, and continues to have, a built-in expiration date. Had Congress determined that minority citizens in covered jurisdictions now enjoy the right to vote and a fair opportunity to elect the candidates of their choice free of discrimination, on a par with minority citizens in non-covered jurisdictions, Congress would not have reauthorized Section 5. Instead, it concluded that "the temporary provisions of the VRA are still needed." *2006 House Report* 6.

Congress understood that extending Section 5 for an additional 25 years would permit future Congresses to rely on data from two more decennial redistricting cycles in evaluating whether to extend the VRA further. *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 167 (2006). After determining that there remains a vital need for Section 5, it was reasonable for Congress to extend the provision for long

enough to allow Congress to collect sufficient information to make a careful assessment about whether Section 5 is still necessary at the expiration of the current reauthorization period. The district court properly concluded that Congress's judgment that an extension of that length was appropriate is entitled to respect. Cf. *Eldred* v. *Ashcroft*, 537 U.S. 186, 208-210 (2003).

4. In objecting to the nature of Section 5's preclearance remedy, appellant also repeats arguments that have already been considered and rejected by this Court.

a. Appellant contends (J.S. 39) that Section 5 cannot be congruent and proportional because it imposes a "substantial burden on constitutional values of federalism and state authority over law- and policymaking processes that lie at the heart of the States' status as sovereign entities." Section 5 is indeed an intrusive remedy. See *Katzenbach*, 383 U.S. at 315, 327, 337. But, as this Court has recognized, such intrusiveness is permissible in this unique context in order to enforce the fundamental guarantees of the Fifteenth Amendment. See *Lopez*, 525 U.S. at 284-285 ("[T]he Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however."); *id.* at 282 ("[T]he Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States."). As this Court has stated, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'" *City of Rome*, 446 U.S. at 179.

b. Appellant also contends (J.S. 38-40) that Section 5 exceeds Congress's authority because it prohibits

some voting practices that were not adopted with a discriminatory purpose and therefore do not violate the Constitution. But this Court has repeatedly affirmed Congress's general authority to "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent." *Lane*, 541 U.S. at 520. More specifically, the Court has upheld Section 5's prohibition of "voting practices that have only a discriminatory effect." *City of Rome*, 446 U.S. at 175. Enforcing a constitutional right by "prohibiting a somewhat broader swath of conduct" than is prohibited by the Constitution is a far cry from attempting to redefine a constitutional right. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000). While the latter is unconstitutional, see *City of Boerne*, 521 U.S. at 532, this Court has held that the former is a legitimate means of preventing and remedying constitutional violations, see *Katzenbach*, 383 U.S. at 327. And, as this Court has repeatedly held, Section 5 falls squarely on the legitimate side of that line.

Moreover, where Congress has tried and failed to provide legislative remedies for a constitutional problem, this Court has held that Congress is justified in enacting "prophylactic measures in response." *Hibbs*, 538 U.S. at 737; see *Lane*, 541 U.S. at 531. In upholding Section 5, the Court in *Katzenbach* chronicled Congress's previous unsuccessful legislative attempts to address the problem of discrimination in voting. 383 U.S. at 309-315. Appellant argues that the existence of Section 2 of the VRA makes Section 5 unnecessary, but in reauthorizing Section 5 in 2006, Congress made extensive findings about the inadequacy of Section 2 to address voting discrimination in covered jurisdictions. As this Court noted in *Katzenbach*, Congress initially enacted Section 5 precisely because it found that case-

by-case adjudication was an inadequate means of preventing and remedying voting discrimination in covered jurisdictions. 383 U.S. at 314; see *City of Rome*, 446 U.S. at 174.

Specifically, Congress found three shortcomings of Section 2 litigation that are not present in the Section 5 preclearance system. First, Section 2 is purely an after-the-fact remedy, available only to challenge voting practices and procedures that are already in place. One witness before Congress testified that most Section 2 actions take two to five years to make their way through the court system, during which time the challenged practice remains in place no matter how discriminatory it is. *History, Scope, & Purpose* 101 (statement of Anita S. Earls). If, during that time, a candidate is elected under what turns out to be an illegal voting scheme, that person nevertheless will enjoy the significant advantage that comes with incumbency. *Impact and Effectiveness* 13-14 (statement of Rep. Kemp); *Evidence of Continued Need* 97 (statement of Joe Rogers). In some cases, a Section 2 plaintiff must allow an illegal voting practice to be in effect for several election cycles before the plaintiff can gather enough evidence to demonstrate the practice's discriminatory effect. *History, Scope, & Purpose* 92 (statement of Nina Perales, Mexican-Am. Legal Def. & Educ. Fund). By contrast, under Section 5, discriminatory voting practices are forestalled through a system that takes at most several months. *Id.* at 101 (statement of Nina Perales).

Second, Section 2 places a heavy financial burden on minority voters challenging illegal election practices and schemes. See *History, Scope, & Purpose* 92, 97 (statement of Nina Perales). Section 5, by contrast, takes the financial burden off minority voters while placing the

comparatively small financial burden associated with preclearance onto covered jurisdictions. See *id.* at 79 (statement of Anita S. Earls). That is especially important in small and rural communities where voters generally "do not have access to the means to bring litigation under Section 2 of the Act, yet * * * are often the most vulnerable to discriminatory practices." *Id.* at 84 (statement of Anita S. Earls).

Third, Section 2 leaves the burden of proof on minority plaintiffs with respect to demonstrating discriminatory effect, while Section 5 places the burden on jurisdictions to demonstrate that a proposed change will not have a discriminatory effect and was not animated by a discriminatory purpose. *History, Scope, & Purpose* 83 (statement of Anita S. Earls); *Evidence of Continued Need* 97 (statement of Joe Rogers). Jurisdictions are in a much better position than individual citizens to amass information about any potentially discriminatory effects of voting procedures or systems, without incurring undue expense. It is therefore appropriate to place the evidentiary burden on them. See *United States* v. *Fior D'Italia, Inc.*, 536 U.S. 238, 256 n.4 (2002).

If Section 2 were in fact an adequate means of halting discrimination against minority voters in covered jurisdictions, the Attorney General would not have had to interpose more than 421 objections based on discriminatory purpose since 1982. J.S. App. 76-77. The fact that it took Section 5 to halt the implementation of so many intentionally discriminatory voting practices is powerful evidence that Congress reasonably concluded that Section 2, by itself, has not sufficiently deterred covered jurisdictions from discriminating.

5. Finally, it follows a fortiori from the foregoing discussion of the congruence-and-proportionality stan-

dard that the district court properly concluded that Congress's decision to reauthorize Section 5 was rational, and therefore constitutional, under the *Katzenbach* standard. 338 U.S. at 324; see J.S. App. 112-118. As the district court explained, there is ample evidence in the legislative record to conclude that, at a minimum, Congress "rationally * * * concluded that unless it extended Section 5, 'racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.'" J.S. App. 57 (quoting 2006 Reauthorization § 2(b)(9), 120 Stat. 578); see *id.* at 58-112 (summarizing evidence). Plenary consideration of that carefully considered and documented determination is not warranted.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Section 5 of the Voting Rights Act strikes at the heart of federalism, injecting the federal government directly into the state and local legislative process. As reenacted in 2006, §5 imposes a federal veto on jurisdictions selected based on 40-year-old data and extends it well into the twenty-first century, locking in place the legislative judgments of the 1960s, rather than reflecting any fresh analysis of where §5's extraordinary remedy might be needed today, if anywhere. That portrayal unfairly demeans current residents of all races in covered jurisdictions and diminishes both the progress our country has made and the gravity of the evils the civil rights movement fought to overcome. The approach taken by Congress in reenacting §5, and championed by appellees, treats racism as an inheritance that runs with the land rather than a manifestation of attitudes and actions of living individuals.

The VRA's bailout provision expressly authorizes political subdivisions like the district to seek exemption from §5's burdens. But the Department of Justice and the district court have interpreted the bailout provision so restrictively it cannot function as intended. If that provision were interpreted and applied consistent with its plain language, purposes, and history, bailout might function to restrain §5's overbreadth, mitigating constitutional concerns. The district's spotless record of respecting the rights of all its voters presents exactly the type of compliance bailout was intended to reward and encourage.

Regardless, the record amassed by Congress in 2006 demonstrates that remaining instances of discriminatory voting practices can be dealt with by ordinary litigation, not that the electoral gamesmanship that originally justified §5 continues systematically to pervade covered jurisdictions, nor that the animus that gave rise to such conduct remains, held in check only by §5. There is no indication that §5 is the only thing keeping today's officials from reverting to the ways of their long-ago predecessors, nor that the threat of conventional litigation is not now deterrent enough. Travis County's very defense of §5 in this suit illustrates the changed conditions that make §5's continuation indefensible—the provision was never directed to jurisdictions that were intent on protecting voting rights.

When upholding the far-reaching, federally intrusive §5 as enacted in 1965 and 1975, the Court recognized that this extraordinary prophylactic was an appropriate means of enforcing constitutional guarantees against voting discrimination only because exceptional conditions made enforcement by less intrusive means demonstrably futile. Those circumstances no longer existed in 2006, and no evidence in the 2006 record justifies keeping long-compliant jurisdictions in federal receivership for another quarter-century. At the very least, the Court should correct the district court's interpretation of the bailout provision to permit jurisdictions like the district to show they deserve exemption from §5.

ARGUMENT

I. THE DISTRICT IS ENTITLED TO PURSUE BAILOUT.

The preclearance coverage and bailout provisions work in tandem to require preclearance from States and political subdivisions for a period of time, but also to hold out the promise of bailout from those requirements on a showing of compliance with rigorous substantive criteria. The restrictive bailout mechanism defined by the district court defeats the parallelism created by Congress in the 1982 amendments, contradicts the broad definition of "political subdivision" applied throughout the VRA notwithstanding §14(c)(2), makes bailout a hollow promise for the vast majority of covered jurisdictions, and eliminates the best chance to measure voting-rights progress by covered jurisdictions by locking them out of any bailout opportunity.

Section 4(a) permits "any political subdivision of" a covered State to seek a bailout declaration. 42 U.S.C. §1973*b*(a)(1). Beyond limiting the category of political subdivisions that could be separately designated for coverage, the definition of "political subdivision" in §14(c)(2) has never previously been used to preclude application of the VRA's provisions to non-county political subdivisions. To the contrary, the term has been expansively interpreted in every instance to extend the duties and obligations of the VRA uniformly and comprehensively to political subdivisions like the district. The Court's holdings that §5 and other VRA provisions reach political

subunits other than counties or other entities that register voters turned on its conclusion that "Congress' exclusive objective in §14(c)(2) was to limit the jurisdictions which may be separately designated for coverage under §4(b)." *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 131, n.18 (1978); see *id.*, at 118, 120-122; *Dougherty County, Ga. Board of Educ.* v. *White*, 439 U.S. 32, 43-44 (1978); see also *Dougherty County*, 439 U.S., at 47 (Stevens, J., concurring) (recognizing that *Sheffield*'s treatment of §14(c)(2) compelled the result in *Dougherty County*), 54-55 (Powell, J., dissenting) (recognizing that *Sheffield* held a city is a political subdivision).[1]

Contrary to appellees' assertions, *City of Rome* v. *United States*, 446 U.S. 156 (1980), simply applied pre-1982 §4(a), which expressly limited bailout to States and separately covered subdivisions. *Id.*, at 164-165, 167-168. *Rome*, in fact, confirms that units not falling within §14(c)(2)'s definition must be regarded as "political subdivisions" for many purposes under the Act. *Rome* explains that *Sheffield* did not "suggest that a municipality in a covered State [like Rome] is itself a 'State' for purposes of the §4(a) exemption procedure." 446 U.S., at 168. And §5 authorizes only a "State or *subdivision*" to institute a §5 declaratory judgment action or make submissions to the Attorney General. 42 U.S.C. §1973*c*(a) (emphasis

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[1] Accord *Smith* v. *Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 592-594 (CA9 1997); *United States* v. *Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 554-555 (CA5 1980).

added). Absent the Court's limiting interpretation of §14(c)(2), units like the district could not initiate a §5 action or preclearance submission, nor have observers assigned or petition for their removal, *id.*, at §§1973*a*, 1973*f*(a)(1)-(2), 1973*k*(c), be subject to §2, *id.*, at §1973, be statutorily prohibited from using discriminatory requirements, *id.*, at §§1973(a), 1973*b*(a)(1), or required to protect language minorities' voting rights and provide non-English election information, *id.*, at §§1973*b*(f)(2), (f)(4).[2] Even appellees acknowledge that the §14(c)(2) definition of "political subdivision" cannot apply to §2. NAACP Br. 17 (citing *Smith*, 109 F.3d, at 592-593). Under the Court's precedent, Congress could not import the §14(c)(2) definition into §4(a) except by a relevant statutory change. See *Georgia* v. *United States*, 411 U.S. 526, 533 (1973).

Adding "though such determinations were not made with respect to such subdivision as a separate unit" following "any political subdivision of [a covered] State," 42 U.S.C. §1973*b*(a)(1), does not incorporate §14(c)(2) into §4(a). The phrase directly responds to *Rome* and does nothing to limit "any political subdivision" to only those political subdivisions that could be separately covered. Similarly, nor does

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[2] See, *e.g.*, *City of Lockhart* v. *United States*, 460 U.S. 125, 129 (1983); *City of Dallas* v. *United States*, 482 F.Supp. 183, 184 (DDC 1979) (*per curiam*); *Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d, at 556; *James* v. *Humphreys County Board of Election Comm'rs*, 384 F.Supp. 114, 119 (ND Miss. 1974).

interpreting §4(a) according to its plain language "give the phrase 'political subdivision' two different meanings in Section 4(a)." NAACP Br. 18. That only certain types of political subdivision are eligible to have determinations made with respect to them "as . . . separate unit[s]," 42 U.S.C. §1973*b*(a)(1), does not require "political subdivision" to be read as referring to only such subdivisions.

Further, giving "political subdivision" its ordinary meaning does not fail to give "governmental units," 42 U.S.C. §1973*b*(a)(1)(D), (F), "independent meaning." NAACP Br. 18. Governmental units within the territory of a political subdivision are themselves political subdivisions *of the State* in which they reside, not the geographically larger political subdivision. The district, for example, is a political subdivision of Texas, not Travis County, but it is also a governmental unit geographically within Travis County that would have to be included in a county bailout.

Given the Court's prior interpretation of the §14(c)(2) definition, Congress's subsequent failure to abrogate that interpretation, the plain meaning of "political subdivision," and the uniform use of the phrase throughout the VRA, there can be no doubt that §4(a) authorizes the district to pursue bailout. To the extent appellees' contrary interpretation of §4(a) is even plausible, it must give way to the less constitutionally problematic conclusion that §4(a) establishes a broadly available route to release from §5's strictures. See *Clark* v. *Martinez*, 543 U.S. 371,

381-382 (2005); *Miller* v. *Johnson*, 515 U.S. 900, 926-927 (1995).

Appellees urge the Court to consider the country's past experience with §5 when evaluating the constitutionality of its 2006 reenactment. They also tout bailout as the safety valve that renders §5 congruent and proportional. In evaluating that assertion, and in choosing among plausible constructions of §4(a), the Court should consider the decades of experience with the post-1982 bailout regime. That, out of thousands of covered jurisdictions, only 15 (all in Virginia) have bailed out since 1982[3] demonstrates that bailout as it has been applied by DOJ cannot mitigate §5's overbreadth problem. Cf. Winke, Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy, 28 N.Y.U. Rev. L. & Soc. Change 69, 111 (2003) ("The bailout provisions are thus required to cut the potentially overbroad preclearance remedy down to a size congruent with the problem of persistent racial discrimination in voting.").

At least one non-Virginia county is known to have attempted bailout and then abandoned the effort. Hebert, An Assessment of the Bailout Provisions of the Voting Rights Act, in Voting Rights Act Reauthorization of 2006 257, 273 & n.62 (Henderson ed., 2007). The very dearth of attempts illustrates

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[3] Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm#note1.

that, as currently applied, bailout is an empty promise: unavailable to political subdivisions that can make the required showing and impossible for those DOJ will allow to try. It unnecessarily and unfairly creates a false impression of stagnation and failure that is contrary to the record of substantial progress. That result is inconsistent with Congress's expectation that, as early as 1982, a large number of covered jurisdictions had sufficiently positive records to qualify for bailout. See S. Rep. No. 97-417, at 59 (1982); H.R. Rep. No. 97-227, at 39 (1981). Properly interpreted, however, bailout could serve the supremely beneficial purposes of incentivizing political subdivisions to demonstrate a strong record of compliance and creating a measurable record of progress and success.

By interposing counties between the federal government and the States to which political subdivisions like the district answer, the restrictive interpretation of §4(a) also reorders state government. Appellees cite no authority for congressional power to endow one subdivision of a State with political control over another that it does not enjoy under state law. The version of §4(a) considered in *Rome* did not present this particular constitutional problem. Before 1982, only a State had control over whether its subdivisions could terminate coverage obligations that were incurred only because those entities were within a covered State. *Rome*, 446 U.S., at 167. A State always has control over its subdivisions, and that arrangement did not interpose one subdivision in a

State between the State and other subdivisions. See Williamson, The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bail-out Provisions, 62 Wash. U. L.Q. 1, 42 (1984).

Section 4(a) can and should be read to use "political subdivision" in its ordinary, broad sense. That interpretation is not merely plausible but compelled by precedent and the Constitution.

II. SECTION 5 CANNOT CONSTITUTIONALLY BE APPLIED TO THE DISTRICT.

In any event, the 2006 enactment of §5 exceeded Congress's power to enforce the Fourteenth or Fifteenth Amendments. Congress did not, and could not, show that the "exceptional conditions" that "can justify legislative measures not otherwise appropriate," *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334 (1966), continue to obtain, justifying the perpetuation of federal preclearance. Section 5 is out of all proportion to such voting discrimination as may still persist, does not target the kind of discriminatory activity on which Congress primarily relied, and has no rational geographic or meaningful temporal limits.

A. The Court Has Consistently Scrutinized Whether Measures, Including and Particularly §5, Appropriately Enforce Constitutional Guarantees.

The standard for determining whether congressional action purporting to enforce the Reconstruction

Amendments is appropriate is a unitary one, drawn from the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Katzenbach* and further explicated in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and subsequent cases. And that standard uniformly applies to legislation purporting to enforce either the Fourteenth or Fifteenth Amendment. See *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 373, n.8 (2001) (enforcement clauses "virtually identical").

While themselves suggesting that sharp distinctions divide *Katzenbach* from *Boerne* and arguing that only *Katzenbach* applies in reviewing Congress's reenactment of §5, appellees, ironically, accuse the district of "attempt[ing] to set up a strict dichotomy" between the two. AG Br. 7. But the district's consistent position has been that *Boerne* and cases following it are refinements of, not alternatives to, *Katzenbach*'s analysis. *E.g.*, Aplt.'s Br. 32-35. Because *Boerne* simply specifies the procedures of *Katzenbach*'s inquiry, applying *Katzenbach*'s standard requires consideration of the refinements explained in *Boerne* and subsequent cases.

Measures sweeping too far beyond proscription of constitutional violations do not "enforce" those guarantees and instead work impermissible substantive alterations to the constitutional fabric. See *Boerne*, 521 U.S., at 519. To guard against that danger, the Court has evaluated the relationship between such prophylactic legislation and the scope of specific problems Congress identified and the degree of the prophylactic's overbreadth. *E.g.*, *Fla.*

Prepaid Postsecondary Educ. Expense Board v. *Coll. Sav. Bank*, 527 U.S. 627, 639 (1999) (after "identify[ing] conduct transgressing" constitutional guarantees, Congress must "tailor its legislative scheme to remedying or preventing such conduct"). Procedurally, Congress must compile a legislative record evidencing a "history and pattern" of constitutional violations of the right purportedly being enforced, *Garrett*, 531 U.S., at 368, which for both the Fourteenth and Fifteenth Amendments requires demonstrating a pattern of purposeful discrimination in proportion to the legislative measures selected to remedy or prevent such conduct, see *Shaw* v. *Reno*, 509 U.S. 630, 641 (1993); *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion).

Appellees suggest this framework is inapplicable because no interbranch conflict like that in *Boerne* over the meaning of the Free Exercise Clause arises with respect to §5. But the serial reenactment of §5, even more clearly than the attempted redefinitions of procedural due process in *Florida Prepaid* or equal protection in *Kimel* v. *Fla. Board of Regents*, 528 U.S. 62 (2000), and *Garrett*, risks radically altering the substantive protections afforded by the Fifteenth Amendment.

Although the amendment itself is not violated absent discriminatory intent, §5 preempts not only changes to voting practices made with no such intent that nonetheless produce discriminatory effects, but also any change that would likely have any marginal negative effect on protected minorities' effective

exercise of the franchise. See *Georgia* v. *Ashcroft*, 539 U.S. 461, 484-485 (2003). The one-way ratchet of nonretrogression has, over its four-decade life, ensured that the line demarcating conduct violating §5 deviates ever farther from that delimiting constitutional permissibility.

Nowhere is this concern clearer than in §5's encouragement of racial classifications in redistricting practices to satisfy the nonretrogression standard through creation and maintenance of majority-minority and other minority-group-favoring districts. See Thernstrom Amicus Br. 9-13, 25-37. Rather than guaranteeing citizens freedom from purposeful discrimination in voting based on race, the 2006 reenactment of §5 "blatantly mandates probable success for the preferred candidates of certain racial groups." *Id.*, at 27. To the extent §5 has been applied to suggest race be "*the* factor," *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2753 (2007), in redistricting, it is clearly in tension with Fourteenth and Fifteenth Amendment guarantees—perhaps outright violating them, see *Miller*, 515 U.S., at 927—rather than appropriately enforcing them. And this is but one example of Congress's attempted redefinition, through serial reenactment of §5, of the rights secured by the Fifteenth Amendment.

Additionally, in the 2006 reauthorization, Congress expressly attempts to override *Reno* v. *Bossier Parish Sch. Board*, 528 U.S. 320, 335-336 (2000) (preclearance can be denied only for vote dilution with retrogressive effect, regardless of purpose). 42 U.S.C. §1973*c*(a)-(c); H.R. Rep. No. 109-478, at 68

(2006) ("any voting change motivated by any discriminatory purpose is prohibited under Section 5"). That amendment imposes a different substantive constitutional standard in covered jurisdictions than elsewhere.

Moreover, constitutional concerns of the same magnitude as the separation-of-powers issue confronted directly in *Boerne* arise when Congress infringes other principles embedded in the Constitution, notably severely disrupting the state-federal balance. See *United States* v. *Morrison*, 529 U.S. 598, 620 (2000) ("[T]he language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."). Appellees' failure to respect the continued vitality of federalism as a constitutional principle would radically transform congressional authority, requiring the conclusion that any valid proscription of behaviors that risk constitutional violations could be enforced by a federal preemptive scheme like §5. States could, for example, be required to submit architectural plans for federal preapproval on the same record that justified a simple cause of action against states under Title II of the ADA. But that cannot be correct. The enforcement authority granted Congress by the Reconstruction Amendments "was not intended to strip the States of their power to govern themselves or to

convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation." *Oregon* v. *Mitchell*, 400 U.S. 112, 128 (1970) (Black, J.).

Appellees misapprehend the nature and purpose of the analysis the Court consistently applies to test the validity of congressional attempts to enforce the Reconstruction Amendments by means encroaching on state sovereignty. There is no question that the Thirteenth, Fourteenth, and Fifteenth Amendments expressly give Congress power "to enforce" their guarantees against the States. U.S. Const., Amdts. 13, §2; 14, §5; 15, §2. Appellees beg the question when asserting that Congress enjoys near-limitless deference when enforcing the amendments. The Court's framework for analyzing statutes that infringe on state prerogatives is designed to determine whether they actually enforce constitutional rights or instead exert a power the Constitution does not grant Congress.

Under appellees' rule, Congress is free to legislate against the States and their subdivisions as it pleases as long as it purports to be doing no more than enforcing inarguable constitutional guarantees. But RFRA was not immune from scrutiny for overbreadth because Congress purported to be enforcing the fundamental First Amendment right of free exercise. *Boerne*, 521 U.S., at 519. As to §5, the issue is not whether Congress has the power to enforce Fourteenth and Fifteenth Amendment guarantees against racial discrimination in voting. It is whether,

in pursuit of that objective, Congress has the power to mandate preemptive screening of tens of thousands of local enactments—the vast majority of which are constitutionally innocuous—in some or all of the country. *Boerne* does not suggest that RFRA would have been permissible had it required local governments to submit every local ordinance potentially affecting religion to federal authorities for predetermination of whether they actually violated the Free Exercise Clause, at least absent a showing that such a measure was remotely proportional to actual violations.

Neither the Court's analytical framework nor the substantive standards of congruence and proportionality it embodies are altered by the fundamental nature of the rights protected. Nor did *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003), or *Tennessee* v. *Lane*, 541 U.S. 509 (2004), vary the degree of judicial deference to congressional action in such a manner; rather, each properly considered the relative ease of demonstrating constitutional violations in the context of heightened scrutiny and emphasized that amassing a record of predicate violations was accordingly easier for Congress. See *Lane*, 541 U.S., at 524; *Hibbs*, 538 U.S., at 736. Appellees' assertion that, in actions enforcing the Fifteenth Amendment, Congress is at the zenith of its power is immaterial; the relevant point is that infringements of Fifteenth Amendment guarantees can theoretically be more easily compiled in a record supporting enforcement legislation. However, when, as in the 2006

enactment of §5, the congressional record demonstrates that the scope, scale, and nature of constitutional violations are not proportional to the purported remedy's infringement of state prerogatives, prophylactic legislation must fail because it does not "enforce" the Amendment.

Stare decisis in no way compels upholding a 2006 reenactment of §5 that the Court has never previously considered. Neither *Katzenbach* nor *Rome* upheld the abstract "Section 5," shorn of any context from its various legislative enactments, that appellees suggest. See, *e.g.*, NAACP Br. 22-28. *Georgia* v. *United States* did not expressly consider the 1970 renewal of §5, merely noting in passing that the Court had recently "upheld the basic constitutionality of the Voting Rights Act." 411 U.S., at 531-532. And appellees overread *Lopez* v. *Monterey County*, 525 U.S. 266 (1999), as upholding the 1982 enactment of §5. *E.g.*, AG Br. 6, 15; NAACP Br. 26, 29. *Lopez* no more addressed the constitutionality *vel non* of §5 than did the Court's recent decision in *Riley* v. *Kennedy*, 128 S.Ct. 1970 (2008). Both decisions concern the reach of the statutory language. *Riley*, 128 S.Ct., at 1977; *Lopez*, 525 U.S., at 282-284. The constitutional question in *Lopez* was that raised by California in its brief—whether §5 could be constitutionally applied to require preclearance of legislation enacted by a noncovered state when a covered locality sought to administer that change—not the constitutionality of §5 generally. *Lopez*, 525 U.S., at 282-284; Br. for Appellee State of California, at 1, *Lopez*, 525 U.S., at

266. Nor has the Court elsewhere passed on the 1982 enactment. See Karlan, Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act, 44 Hous. L. Rev. 1, 11-12 (2007) (noting that *Boerne* appeared to "deliberately avoid passing on the question" of congressional authority to reenact §5 in 1982).

Katzenbach and *Rome*—addressing the 1965 and 1975 enactments, respectively—each considered a unique legislative act and the distinct record amassed by Congress at different points in time. *E.g.*, *Katzenbach*, 383 U.S., at 334. Nor did *Boerne*'s treatment of *Katzenbach* constitute the specific reaffirmation of §5 that appellees suggest it does. *Boerne* lauded as the paradigmatic example of an appropriate congressional exercise of the enforcement power not §5 as a statutory provision, but *the 1965 enactment of §5 on the record then before Congress*. See 521 U.S., at 525-526. Indeed, if *Katzenbach* had the super-precedential effect appellees attribute to it, *Rome* would have never needed to reach the contention that changed conditions made the 1975 extension of §5 inappropriate. See 446 U.S., at 180-182. And *Rome*'s reliance on §5's (ever-extending) sunset provision as a justification for its constitutionality further confirms that the precedential effect of those decisions was intentionally limited to the specific congressional enactments at issue, not future ones. See *id.*, at 182; see also *Boerne*, 521 U.S., at 533. The Court has recognized that time limits were part of what made earlier enactments of §5 constitutionally appropriate

legislation when they occurred, *Boerne*, 521 U.S., at 533, a meaningless consideration if upholding one enactment of §5 validated the provision's renewal in perpetuity. The most recent reenactment of §5 must be considered on its own merits, not those of prior enactments, in light of the circumstances Congress confronted and evidence it weighed in 2006.

Similarly, neither congressional assumptions about the framework for reviewing its enactments nor the fact that "Congress was not legislating on a blank slate," NAACP Br. 32, warrants any variation in the standard for judging enforcement legislation. The consequence of the first premise would be that review of VRA reenactments would be forever inappropriately deferential merely because, in 1965, §5's dramatic intrusions on the constitutionally determined federal-state relationship were appropriate in light of then-existing emergency circumstances. And under the second, review of congressional action would be weakest at the precise point at which, assuming the legislation's effectiveness over time, the need for reenactment had been eliminated. Both premises are patently flawed.

The Court has consistently recognized that §5 addresses not voting discrimination in general but "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Katzenbach*, 383 U.S., at 335. The 1965 congressional record established that jurisdictions to be covered had a demonstrated, recent history "of staying one step ahead of the federal courts by

passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer* v. *United States*, 425 U.S. 130, 140 (1976) (quoting H.R. Rep. No. 94-196, at 57-58 (1975)); accord *Miller*, 515 U.S., at 926-927; *Allen* v. *State Board of Elections*, 393 U.S. 544, 567-568 (1969). Responding to that then-recent "egregious predicate[]," the 1965 and 1975 enactments of §5 had the presumably meaningful "termination dates" and rational "geographic restrictions" that "tend to ensure Congress' means are proportionate to ends legitimate under" the enforcement power. *Boerne*, 521 U.S., at 533. Under the same scrutiny the Court has always applied to enactments of §5, the 2006 enactment fails.

B. Preclearance Is an Extraordinary Intrusion on State Sovereignty, Reenacted Without Meaningful Limits on Geography, Scope, or Duration.

Preclearance is not the simple paperwork exercise appellees make it out to be, but the direct participation by federal officers in state and local lawmaking. Under §5, the federal Executive may function as a super-governor, vetoing duly enacted state legislation, or a supreme court overruling a State's highest court. See *Riley*, 128 S.Ct., at 1982. The Court has accordingly called §5 an "extraordinary step." *Id.*, at 1977. Because "[t]he federal system established by our Constitution preserves the sovereign status of the States," *Alden* v. *Maine*, 527 U.S.

706, 714 (1999), an intrusion like §5 cannot be taken lightly. *Miller*, 515 U.S., at 926-927.

The Court has invalidated purported remedies that infringe state sovereignty without drawing appropriate geographic lines. See *Morrison*, 529 U.S., at 626; *Fla. Prepaid*, 527 U.S., at 647. It has also emphasized the importance of showing that unconstitutional conduct purportedly targeted is of recent vintage. See *Garrett*, 531 U.S., at 369, n.6. Congress did not and could not show that the renewed §5 continues to be "confined to those regions of the country where voting discrimination" remains "flagrant." *Boerne*, 521 U.S., at 532-533.

Appellees have no real argument for how the §4(b) coverage formula—"reverse-engineered" in 1965, AG Br. 33, unchanged since 1975, and continuing to rely only on data from 1972 and earlier, 42 U.S.C. §1973*b*(b)—could draw rational geographic lines in 2006. Their only response is, essentially, that the outdated proxies continue to define jurisdictions known to have engaged in defiant discrimination through the 1960s. AG Br. 33-34. But Congress cannot rationally presume that officials in covered jurisdictions continue to engage in "unremitting and ingenious defiance of the Constitution," *Katzenbach*, 383 U.S., at 309, simply because it was so in 1965.

Within covered jurisdictions, §5's reach is wide and deep. Section 5 reaches all manner of state and local changes with even the arguable potential to affect voting. *Allen*, 393 U.S., at 566-567. As

illustrated by its application to a small utility district, it inserts the federal government into legislative processes right down to the neighborhood level, and it even reaches entities that do not conduct elections. *Dougherty County*, 439 U.S., at 44. Appellees' focus on similarities between the substantive standards for an objection under §5 and a violation of the Act's §2 is misplaced. The focus must be on the breadth of constitutionally benign conduct §5 touches by mandating federal vetting of thousands of innocuous changes by thousands of governmental entities.

Further, Congress's 2006 extension of §5 for another quarter-century indicates that Congress does not seriously regard it as time limited. The original five-year response to emergency conditions, *Katzenbach*, 383 U.S., at 334-335 (citing *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398 (1934), and *Wilson* v. *New*, 243 U.S. 332 (1917)), is now a 66-year remedy that appellees posit can continue to be justified indefinitely by the long history of pre-1965 discrimination.

C. The 2006 Congressional Record Establishes That §5 Is No Longer an Appropriate Remedy.

Appellees' insistence that §5 need not be justified by evidence that gamesmanship continues to pervade covered jurisdictions verges on conceding that the 2006 record contains no such evidence. And it ignores the Court's consistent recognition that

> "Congress took the extraordinary step of requiring covered jurisdictions to preclear all changes in their voting practices because it 'feared that the mere suspension of existing tests [in §4(a)] would not completely solve the problem, given the history some States had of simply enacting new and slightly different requirements with the same discriminatory effect.'" *Riley*, 128 S.Ct., at 1977 (quoting *Allen*, 393 U.S., at 548); accord *Miller*, 515 U.S., at 925; *Beer*, 425 U.S., at 140; *Katzenbach*, 383 U.S., at 335.

It also defies common sense. "[T]he cumbersome nature of case-by-case adjudication," AG Br. 52-54; Louis Br. 10-11, could not alone justify §5, otherwise §5 would apply nationwide, and similar preclearance regimes could be imposed to preempt constitutional violations of all sorts. When §5 was originally enacted, something unique about case-by-case litigation in covered jurisdictions warranted it: the iterative state action designed to thwart federal enforcement. *Katzenbach*, 383 U.S., at 309, 328 (noting "unremitting and ingenious defiance," "obstructionist tactics," and "systematic resistance").

Generalized evidence that discriminatory practices occur may justify the VRA's proscriptive, targeted §2, but more is needed to justify preemptive, scattershot §5. And §2 is at least as good a deterrent to constitutional violations as §5. Travis County cites avoidance of §2 suits as a purported benefit of §5. Travis County Br. 11. But it cannot explain how the mere threat of §2 litigation is not sufficient incentive

for the county to make its best efforts to protect voting rights, especially when "[i]t would undoubtedly prove more costly to the County to litigate a Section 2 case to conclusion." *Ibid.*

In considering the 2006 congressional record, appellees would have the Court ignore the forest for the trees. But the Court should look beyond appellees' exhaustive treatment of the voluminous record to recognize that the record utterly lacks evidence that the covered jurisdictions as a group persist in the conduct that warranted §5's uniquely intrusive remedy in 1965 or 1975. The record contains only a handful of examples that are even arguably instances of the gamesmanship §5 targets, a far cry from showing that the targeted conduct pervades covered areas or threatens to return. See *Garrett*, 531 U.S., at 369-370 (half-dozen relevant examples "f[e]ll far short of even suggesting the pattern of unconstitutional discrimination on which §5 legislation must be based").

Even if the more generalized evidence of discrimination were relevant to the particular remedy of preclearance, that evidence could not justify continuing §5 in its irrationally drawn coverage area. Properly viewed against the tens of thousands of voting changes and elections occurring in thousands of covered jurisdictions over decades, the comparatively very few problems identified hardly establish that case-by-case adjudication remains inadequate.

Appellees cannot point to evidence of systematic resistance, instead offering examples of incidents

that occurred decades apart, *e.g.*, Louis Br. 17-19 (discussing incidents in Waller County, Texas in 1978, the early 1990s, and 2004 and in Seguin, Texas in 1978, 1981, 1993, and 2002), incidents that were addressed quickly through case-by-case litigation, *e.g.*, *id.*, at 32-33 (discussing events in Newport News, Virginia resolved three months after §2 suit was filed), the abhorrent actions of private individuals upon whom §5 would have no effect, *e.g.*, *id.*, at 22 (arson); *id.*, at 28 (threats), or other isolated incidents, *e.g.*, *id.*, at 24 (1994 objection to water conservation district's apportionment plan). And the purported examples of gamesmanship intervenors cull from the record are far too few in number to justify §5's coverage of all or part of States, and, in any event, fail as even isolated illustrations of the type of conduct §5 targets.

For example, Dallas County, Alabama's three "separate objections in the 1990s," *id.*, at 47-48, occurred during a seven-month back-and-forth with DOJ over whether *any* reduction, no matter how small, of the minority population in a majority-minority district constituted retrogression. 1 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 109th Cong. 388-390, 397-401 (2005) [hereinafter Section 5 History]; cf. *Georgia*, 539 U.S., at 472-473 (black voting-age population in majority-minority districts reduced to barely over 50%). Dallas County's submissions, each of which preserved an African-American majority of

well over 50% in the relevant district, reflected the uncertainty that surrounded what constituted "'a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise,'" which the Court did not define for another 11 years. *Georgia*, 539 U.S., at 472-473 (quoting *Bush* v. *Vera*, 517 U.S. 952, 982-983 (1996)). If anything, those three objections represent DOJ's efforts in 1992 at using §5 to dictate redistricting based solely on race. See *Miller*, 515 U.S., at 917-918 (finding that DOJ impermissibly used objections and three rounds of preclearance to "demand[] purely race-based revisions to Georgia's redistricting plans").

Similarly, intervenors' example involving Waynesboro, Georgia, Louis Br. 48, better demonstrates the ineffectiveness of §5 than persistent discrimination. The city was at odds with DOJ over a majority-vote requirement at various periods between 1972 and 1994, 1 Section 5 History, at 788-789, but engaged in no "ingenious" behavior that could not have been addressed through ordinary litigation.

Intervenors list 20 jurisdictions—out of the thousands required to preclear—that have received at least two §5 objections. But half of those have received no objections since 1993. Louis Br. 50.[4]

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[4] Indeed, in the most recent example cited, McComb, Mississippi was vindicated, and DOJ precleared the change. *Myers* v. *City of McComb*, 2008 WL 1366112, *1 (SD Miss. Apr. 8, 2008).

The Attorney General's attempt to justify §5 by asserting that there were more than 750 objections interposed between 1982 and the reauthorization of §5 in 2006 is misplaced. AG Br. 43. For one thing, each objection does not represent an instance of discrimination. And many reflect DOJ interpretations the Court subsequently rejected. Hasen, Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After *Tennessee* v. *Lane*, 66 Ohio St. L.J. 177, 192-193 (2005) (citing *Bossier Parish*, 528 U.S., at 341; *Reno* v. *Bossier Parish Sch. Board*, 520 U.S. 471, 474 (1997); *Miller*, 515 U.S., at 928). After *Miller* ended DOJ's practice of requiring the maximum number of majority-minority districts, 515 U.S., at 924-926, the number of objections decreased dramatically. From 1996 through 2005, DOJ registered only 72 objections out of 45,121 submissions, or only *seven per year*. H.R. Rep. 109-478, at 22. And 40 of the objections—more than half—were to redistricting plans, *id.*, which are fraught with partisan politics. See *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 410-413 (2006). Many of those redistricting plans could not have been objected to under *Georgia* v. *Ashcroft*'s totality-of-the-circumstances standard. See 539 U.S., at 480.[5]

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[5] Even considering all 753 objections interposed between 1982 and 2005 and assuming—counterfactually—that all were bona fide, they remain a tiny fraction of the 105,143 submissions made in those 24 years, averaging only 31 objections per year from the thousands of entities required to seek preclearance. H.R. Rep. No. 109-478, at 22.

Nevertheless, the Attorney General attempts to justify renewing §5 with the 1965 coverage formula by asserting that the "rate" of objection increased in Mississippi and Louisiana after 1982. AG Br. 43. Not only does this not address the other jurisdictions, but it is not even accurate. In Mississippi, 112 objections were interposed between 1982 and 2006 while 57 were interposed between 1969 and 1981, indicating the rate over time remained roughly constant. 1 Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 109th Cong. 54 (2006) [hereinafter Evidence of Continued Need] (statement of Wade Henderson). Additionally, the Attorney General's assessment does not account for the significant increases in submissions after 1982; thus, the rate of objections per submission also declined. See Hasen, *supra*, at 190-191.

Although the number of objections is not evidence of gamesmanship or the inadequacy of case-by-case litigation, intervenors attempt to bolster that number by cobbling together all §5 objections, §5 enforcement suits, submissions withdrawn after MIRs, and §2 suits over 25 years. Louis Br. 25. Considered individually, the numbers are paltry: four §5 enforcement suits per year; eight §5 submissions withdrawn per year due to MIRs; and 24 §2 suits per year. Even taken together, those 1,500 incidents—which certainly overstates the number of constitutional violations as MIRs and objections do not alone establish discriminatory intent or effect—amount to

only 60 objections per year from across thousands of entities required to seek preclearance.[6]

Further, the resolution of §2 suits in favor of minority voters does not justify circumventing the normal litigation process; rather it demonstrates that case-by-case litigation is effective. And the numbers reveal that the caseload is manageable, especially by a DOJ whose resources are not dissipated by vetting tens of thousands of innocuous §5 submissions. The Attorney General cites the finding that 57% of the 117 §2 suits with outcomes favorable to minority voters were filed in covered jurisdictions. AG Br. 38.[7] But that amounts to 67 cases over 24 years, an average of less than 3 cases per year, hardly evidence of "unremitting and ingenious defiance." *Katzenbach*,

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[6] The Attorney General contends that MIRs were "particularly effective" from 1999-2005. AG Br. 46. Not only does this assume that MIRs always identify purposeful discrimination, but it ignores that the study cited found the effect of MIRs increased *relative to objections* only because MIRs have not decreased as precipitously as objections, though they have fallen by nearly 80% since 1994. Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 213, 218 (2006).

[7] The Attorney General claims covered jurisdictions, representing less than one-quarter of the Nation's population, were subject to more than twice their proportional share of successful §2 litigation. AG Br. 38. The Attorney General fails to mention that the study also found that 35% of the Nation's African-American, Hispanic, and Native American population resides in covered jurisdictions. See 1 Evidence of Continued Need, at 203. It is not surprising that fewer §2 suits are filed in racially homogeneous jurisdictions.

383 U.S., at 309. Moreover, it is difficult to understand how 17 additional suits in covered jurisdictions overwhelm the normal litigation process and justify an Executive veto, while the 50 suits in uncovered jurisdictions do not warrant an intrusion.

The Attorney General also discusses the number of "county-level voting practices" altered by §2 litigation. AG Br. 49. Of course, a single redistricting suit can result in changes across multiple counties. Without any context those numbers reveal little, except perhaps that Texas has more counties than most States. The example of North Carolina is, however, instructive because more than a third of the "county-level voting practices" altered by §2 litigation occurred in uncovered counties. 1 Evidence of Continued Need, at 287. Thus, the mere fact that §2 litigation occurs and has effects cannot justify §5.

Appellees also point to the presence of federal election observers as general evidence of discrimination permitting an inference of the type of gamesmanship at which §5 is aimed. AG Br. 48-49; Louis Br. 11. The Attorney General misleadingly implies that in 2004 there were almost 2,000 observers in *covered* jurisdictions. AG Br. 48. The testimony, however, was that almost 2,000 observers were deployed to at least 27 *unidentified* states. Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 9 (2006). Instead, the data collected by the National Commission on the Voting Rights Act indicates that since 1982, apart from Mississippi, observers have been

sent more frequently to New Mexico, which is not covered by §5, than any covered State. 1 Evidence of Continued Need, at 275. Meanwhile, observers have been sent to New Jersey, an uncovered state, 17 times since 1982—more often than to Texas (10), Louisiana (15), or Virginia (0). *Ibid.* Given Texas's population, number of counties, and entities required to submit changes for preclearance, the presence of observers on only ten occasions cannot justify its coverage under §5.

Nonetheless, intervenors strive to depict Texas as particularly worthy of §5 coverage. Louis Br. 14-24. But, again, the statistics belie the scale of the problem. From 1996 to mid-2005, DOJ interposed only ten objections to proposed voting changes in Texas. 1 Section 5 History, at 209-220 (appendix to statement of Bradley Schlozman). But even looking back to 1982, as intervenors do, DOJ interposed in Texas fewer than five objections per year. Louis Br. 15. And during that time, fewer than seven §2 suits per year were favorably resolved for minorities. *Ibid.* That §2 litigation resulted in more resolutions favorable to minorities than §5 objections suggests §2 is more effective. *Ibid.*

Finally, though the district court relied on the presence of racially polarized voting, see J.S.App.106-108, and Congress found it to be "the clearest and strongest evidence" it had "of the continued resistence [*sic*] within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process," H.R. Rep. No. 109-478, at 34, the

Attorney General offers only a half-hearted, one paragraph defense of racially polarized voting as evidence justifying §5. AG Br. 55. After acknowledging that such voting is not state action, the Attorney General asserts it is a precondition to vote dilution. *Ibid.* But, of course, there are many preconditions to vote dilution, and the mere presence of a single *precondition* to a constitutional violation does not empower Congress to act under the enforcement clauses. See *Fla. Prepaid*, 527 U.S., at 639 (Congress "must identify *conduct* transgressing the Fourteenth Amendment's substantive provisions" (emphasis added)). Merely identifying a *means* of discriminating does not establish a "history and pattern," *Garrett*, 531 U.S., at 368, justifying prophylactic measures. See *Hibbs*, 538 U.S., at 729.

Racially polarized voting is nothing more than the aggregated effect of free choices in voting by individuals, *Thornburg* v. *Gingles*, 478 U.S. 30, 56 (1986), not state action violating the Equal Protection Clause or the Fifteenth Amendment. See *Morrison*, 529 U.S., at 625; *Terry* v. *Adams*, 345 U.S. 461, 473 (1953) (Frankfurter, J.). Nor does racial bloc voting restrict the right to vote or even to vote for a candidate of one's choice; it simply does not implicate the guarantee of the Fifteenth Amendment.

To the extent §5 affects racially polarized voting at all, it likely exacerbates, rather than decreases, that phenomenon. As amici have explained, §5 is regularly interpreted to require gerrymandering to create or maintain majority-minority voting districts

in order to satisfy the burden of nonretrogression given shifting populations, and is even more regularly invoked, more or less ingenuously, as a rationale for doing so voluntarily. Thernstrom Amicus Br. 18-21. These practices not infrequently result in unconstitutional racial gerrymanders. *Ibid.* Indeed, as this Court has long recognized, "a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract" by reinforcing impermissible stereotypes and makes elected officials "more likely to believe that their primary obligation is to represent only the members of [a particular racial] group." *Shaw*, 509 U.S., at 648.

At bottom, appellees argue that §5 is intended to remediate voting discrimination generally, and therefore the record need only evince such discrimination, whether it be private conduct relating to voting or isolated incidents related to the complex and often partisan task of redistricting. Viewing §5's purpose at such a high level of generality is an improper attempt to make it indistinguishable from other aspects of the VRA, eviscerates the "congruence and proportionality" requirement, *Boerne*, 521 U.S., at 520, and renders illusory the demand on Congress to develop a record that establishes a "history and pattern" of deprivation to justify remedial legislation under the enforcement clauses, *Garrett*, 531 U.S., at 368.

CONCLUSION

For these reasons, and those discussed more fully in the district's opening brief, the Court should reverse the judgment of the district court and render judgment that the district is entitled to use the bailout procedure or, alternatively, that §5 cannot be constitutionally applied to the district.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-322

In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., Attorney General, et al.,

Appellees.

**On Appeal From The United States District Court
For The District Of Columbia**

BRIEF OF *AMICI CURIAE* ALASKA NATIVE VOTERS AND TRIBES IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST[1]

Alaska is one of only three states covered in its entirety by Section 4(f)(4) of the Voting Rights Act ("VRA"). *Amici Curiae* are Alaska Native, limited-English proficient ("LEP") individual voters and tribal councils representing hundreds of voters who reside in Alaska. *Amici* have been disenfranchised by the State's use of literacy tests, or their modern-day equivalent, since before statehood. That pattern has continued since the VRA was reauthorized in 2006. State officials failed to provide language materials and permit voter assistance for the *amici*, as required by its voting procedures that the Attorney General precleared in 1981. *Amici* were forced to file claims against the State in federal court for violating substantive provisions of the VRA and failing to obtain Section 5 preclearance for its changes to the 1981 plan. In 2008, that court found that *amici* had "met their burden and established that they are likely to succeed on the merits of the language assistance claims brought under Sections 203 and 4(f)(4) of the VRA and the voter assistance claims brought under Section 208 of the VRA." Dkt. 327, Order Granting

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[1] All parties have consented to the filing of this brief, as provided by Rule 37.3(a). Letters of consent have been filed with the Clerk of the Court. No counsel for a party authored the brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, its members, or its counsel, made a monetary contribution to its preparation or submission.

Mot. for Prelim. Inj. ("*Nick* PI Order"), *Nick v. City of Bethel*, case no. 3:07-cv-0098-TMB (D. Alaska filed July 30, 2008). *Amici's* parallel Section 5 claims have been stayed pending the outcome of this case.

Amici submit their brief to expressly address Question Presented 2 as posed by the Respondent United States: whether "discrimination against minority voters continues to be a problem in covered jurisdictions" and whether "Section 5 remains a valuable tool in preventing, remedying and deterring such discrimination." Petitioner argues that voting discrimination only "persists in haphazard and uncoordinated instances" that is insufficient to justify renewing Sections 4 and 5. Petitioner's Br. at 42-43. However, Alaska's recent violations of the VRA demonstrate that discrimination still exists and that those sections remain vital remedial measures to provide Alaska Natives with equal registration and voting opportunities.

Amici Anna Nick, Billy McCann, David O. David, and Arthur Nelson are LEP Alaska Native voters who reside in the Bethel Census Area of Alaska and whose primary language is Yup'ik. *Amici* Kasigluk Traditional Council, Kwigillingok I.R.A. Council, Tuluksak Tribal Council, and Tuntutuliak Traditional Council are elected governments for federally recognized tribes in the Bethel Census Area. *See* 73 Fed. Reg. 18,553, 18,557 (Apr. 4, 2008). The population of the Bethel Census Area is 85.5 percent American Indian and Alaska Native. Among the citizen voting age population in the Bethel Census Area, 20.82 percent

are LEP. Almost a quarter of LEP voters there are illiterate, nearly sixteen times the national illiteracy rate. These barriers are not the result of happenstance, but are the product of educational discrimination by the State that has not yet been eradicated. *Amici* each were denied public school growing up because Alaska did not provide complete educational services in their villages until as recently as the 1980s.

For example, one of the *amici*, Anna Nick was born in 1939 in Nunapichuk, a remote Yup'ik village inaccessible by road and without any hotels, stores, electricity or running water. *See* Dkt. 201, First Am. Compl. ¶6 ("*Nick* Am. Compl."), *Nick*, *supra* (2008). Like most Alaska Natives in the region, she relies upon a subsistence lifestyle of hunting and fishing for most of her food. When she was growing up, there were no schools in Nunapicthuk or any other Yup'ik-speaking village in the Bethel Census Area, denying Ms. Nick and others like her the opportunity to learn to speak or read English. *See infra* Part III(A). Only a handful of children from her village were willing and able to leave their homes and travel to one of the few distant boarding schools. *See id.* Ms. Nick left home briefly to attend school but only reached the fifth grade. *Nick* Am. Compl., *supra*, at ¶6. The remaining *amici* also are the victims of Alaska's unequal education system; Mr. McCann completed the second grade, Mr. Nelson completed the third grade, and Mr. David completed the fourth grade. *Id.* at ¶¶7-9. There are thousands of Alaska Native voters just like them.

While Congress was reauthorizing the VRA to cover Alaska Natives in 1975, a landmark equal protection case was pending against the State to remedy the lack of education available to Alaska Natives. It was brought by a class of Alaska Native parents and students whose villages did not have secondary schools. *See infra* Part III(A). Although the case was settled in 1976, it was not until the early 1980s that the State legislature appropriated funds to pay for the construction of the first secondary schools in Native villages; the last of those schools were not completed until the mid-1980s. Because of the discriminatory education system, with very few exceptions, only those Alaska Natives born *in the 1970s or later* would have any opportunity to receive a high school diploma.

Alaska's coverage under Section 4(f)(4) of the Act has proven to be an unfulfilled promise to Alaska Natives to help them overcome the State's discrimination. Alaska ignored the mandate of providing language assistance under Section 4(f)(4) for the first six years after it went into effect. In 1981, the Department of Justice reminded the State that it was covered statewide for Alaska Native languages and was required to submit a minority language assistance plan under Section 5. The State complied with the request by obtaining preclearance for a plan that it then did not implement. *See infra* Parts I(A)-(B). During the nearly three decades since then, *amici* and thousands of other Alaska Native LEP voters tried to vote, often skipping ballot questions and initiatives they could not understand. Ms. Nick

served as a poll worker in an effort to assist Yup'ik voters who could not read or speak English, but was forced to quit because she could not understand most of the election materials herself. *Nick* Am. Compl., *supra*, at ¶6. Alaska's violations of Section 4(f)(4) and its failure to submit for preclearance the changes to its unused 1981 language plan have resulted in Alaska Native turnout that consistently trails statewide turnout by 20 percent or more.

If Alaska had complied with Section 5's mandate and submitted the unprecleared changes in its language and voter assistance program in the Bethel region, *amici's* case would have been unnecessary. After two years, $150,000 in out-of-pocket costs, 20 depositions, and a docket that now consists of almost 600 entries, *amici* still do not have relief; even when secured, relief will only apply to the 15,000 persons in the Bethel Census Area. If Alaska had complied with Section 5's mandate, it would have obviated the need for this protracted and costly litigation and helped LEP Alaska Natives statewide. The Justice Department could have identified that Alaska's voting changes had a discriminatory purpose or effect and prevented those procedures from ever being implemented in the first place. Today, all Alaska Natives would be able to exercise their fundamental right to vote. Unfortunately, that will not occur under the "case-by-case" approach advocated by Petitioner, which would perpetuate the exclusion of Alaska Natives from the political process. Petitioner's Br. at 55. Section 5 remains vital to prevent that draconian result. *See infra* Part II.

SUMMARY OF ARGUMENT

Section 5 continues to be essential to protect *amici* from Alaska's discriminatory practices. State officials have been recalcitrant to correct identified violations of the VRA. *See Nick* PI Order, *supra*. They have evaded the requirements of preclearance, routinely submitting discriminatory voting changes and then withdrawing them when the U.S. Department of Justice makes additional inquiries. *See infra* Parts I(A)-(B). They have attempted to realign predominantly Native polling places that are sometimes more than 70 miles apart and inaccessible except by air or boat. *See infra* Part I(C). Absent Section 5, the fragile gains that Alaska Natives have made are at risk. *See infra* Part I(D). Moreover, other substantive provisions of the VRA are inadequate substitutes for Section 5 because of the presence of ongoing discrimination by the State and the extraordinary costs that *amici* have incurred by trying to stop it through a case-by-case approach. *See infra* Part II. Preclearance helps ensure that *amici's* fundamental right no longer has to be conditioned on a federal lawsuit. Finally, the record from the 2006 reauthorization of the VRA refutes Petitioner's argument that the Section 4 coverage formula is outdated. Evidence from Alaska shows that the measures resulting in coverage, educational discrimination and low voter turnout, remain barriers for *amici* and other Alaska Natives. *See infra* Part III. Therefore, the Court should affirm the judgment of the District Court.

ARGUMENT

Section 5 is necessary to remedy ongoing discrimination and the present effects of past discrimination against *amici* and other Alaska Natives. The trigger in Section 4 narrowly targets coverage under Section 5 of the Act to areas where it is needed most. All of Alaska is covered because of the impact that discrimination against Alaska Natives continues to have on political participation statewide. *Amici* and other Alaska Natives like them who were denied access to public schools suffer from illiteracy and lack of English fluency that prevents them from exercising their fundamental right to vote without assistance. Section 5 remains essential to compel Alaska to remove the disabling effects of its discrimination against Alaska Natives. State officials have not done so absent enforcement of Section 5, such as *amici's* pending claim against Alaska. The future of *amici's* enforcement action awaits this Court's decision.

Discrimination is not as overt as it once was, when Alaska Natives were barred from every aspect of political and social life by signs that read "No Natives or Dogs Allowed."[2] Donn Liston, *Gruening Rights Fight Recalled*, Anchorage Daily News, June 28, 1974. Officially, Alaska Native voters are not

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[2] Public places such as hotels, playgrounds, swimming pools, and theaters were segregated until 1945. *See* Terrence M. Cole, *Jim Crow in Alaska: The Passage of the Alaska Equal Rights Act of 1945*, in AN ALASKA ANTHOLOGY: INTERPRETING THE PAST 314, 316-21 (Haycox & Mangusso eds. 1996).

supposed to be required to pass an English literacy test.[3] Nonetheless, the effects of State discrimination against Alaska Natives linger, along with other forms of unequal treatment that continue today.

When Congress renewed the expiring provisions of the VRA in 2006, it found that "significant progress" had been made towards reducing certain barriers to Alaska Natives. *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006* ("VRARA"), Pub L. No. 109-246 §2(b)(1), 120 Stat. 577 (2006). Although Native turnout remained "among the lowest of all communities in the U.S.," their participation rates were "closer than ever" to non-Natives. H.R.REP.NO. 109-478 at 20, *reprinted in* 2006 U.S.C.C.A.N. 630. The number of Native candidates had increased, resulting in "the election of seven new Alaskan Natives to the Alaska State legislature." *Id.* Those examples of "increased participation levels" were "directly attributable to the effectiveness of the

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[3] *See generally* ALASKA CONST. of 1959, art. V, §1 (repealed) (requiring voters to be "able to read or speak the English language as prescribed by the Legislature"); Stephen Haycox, *William Paul, Sr., and the Alaska Voters' Literacy Act of 1925*, 2 ALASKA HIST. 16 (1986-1987) (describing Alaska's literacy test law of 1925 and its 1927 federal counterpart, which required that anyone who did not vote in the 1924 election had to be "able to read and write the English language"). Alaska's constitutional literacy test remained in effect until it was repealed by the 1970 amendments to the VRA. *See* Pub. L. No. 91-285, 84 Stat. 314 (June 22, 1970).

VRA's temporary provisions." *Id.* at 21, *reprinted in* 2006 U.S.C.C.A.N. 630-31.

Despite that progress, the evidence also demonstrated there had been insufficient "time to eliminate the vestiges of discrimination" against Alaska Natives. VRARA §2(b)(7), 120 Stat. 577-78. Discrimination was "more subtle" than the methods previously used but the results were "the same," diminishing the political participation of Native voters. H.R.REP.NO. 109-478 at 6, *reprinted in* 2006 U.S.C.C.A.N. 620. As of 2000, no Native candidate had "been elected to office from a majority white district." *Id.* at 34, *reprinted in* 2006 U.S.C.C.A.N. 638. The lack of white support resulted "in a disparity between the number of white elected officials and the number" of Alaska Natives elected to office. *Id.* Native voters also continued "to experience hardships and barriers to voting and casting ballots because of their limited abilities to speak English and high illiteracy rates ... particularly among the elders." *Id.* at 45-46, *reprinted in* 2006 U.S.C.C.A.N. 650-51. Court decisions found "degraded educational opportunities" for Alaska Natives, resulting in graduation rates that lagged far behind non-Natives. *Id.* at 50-51, *reprinted in* 2006 U.S.C.C.A.N. 651. The record of discrimination in Alaska was substantial. *See Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary* (*Continued Need*), 109th Cong., 2d Sess., at 1308-1362 (2006); *Modern Enforcement of the Voting Rights Act, Hearing Before the Senate Comm. on the*

Judiciary (*Modern Enforcement*), 109th Cong., 2d Sess., at 18-20, 25-27, 29-30, 73-81, 124-26 (2006).

The State's legacy of disenfranchisement remains manifest in the *amici*, who are victims of unequal educational opportunities and have been denied registration and voting opportunities because of their illiteracy and limited-English proficiency. Alaska Natives such as the *amici* continue to encounter English-only election practices that impose the very sort of English literacy tests or devices that the VRA was intended to eradicate. H.R.REP.NO. 109-478 at 52, *reprinted in* 2006 U.S.C.C.A.N. 652-53. Such barriers contributed to Alaska Native voter turnout of just 44.8 percent in the 2004 election, compared to non-Native turnout of 68.4 percent. 152 CONG. REC. S7962 (daily ed. July 20, 2006) (statement of Sen. Specter). Turnout in some Native villages was as low as 12 percent. *Continued Need*, *supra*, at 1333. State officials steadfastly refused to correct any of these violations until they were compelled to do so in 2008 by a federal court. Despite the relief that *amici* obtained, those remedies only apply to Natives residing in a single Census Area of Alaska. Thousands of other Alaska Natives in other parts of the State continue to face barriers to registration and voting that Section 5 could resolve without the need for additional burdensome litigation that would delay their relief for many more years.

Alaska is demonstrative of the congressional finding that without the continuation of the VRA's protections, "racial and language minority citizens

will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." VRARA §2(b)(9), 120 Stat. 577-78. The record from Alaska establishes the constitutionality of the Act's reauthorized provisions, regardless of whether the Court applies a rational basis or a congruence and proportionality standard of review. Far from an unnecessary relic of a bygone era, Section 5 remains essential to combat the present realities of voting discrimination and educational discrimination against *amici* and other Alaska Natives.

I. Section 5 remains a necessary and appropriate prophylactic measure to prevent voting discrimination against Alaska Natives.

Section 5 is a "vital prophylactic tool" that protects the *amici* "from devices and schemes that continue to be employed" in Alaska, which is covered statewide for Alaska Natives. H.R.REP.NO. 109-478 at 21, *reprinted in* 2006 U.S.C.C.A.N. 631. Preclearance has protected Alaska Natives from discriminatory redistricting practices, closure of necessary polling sites, and retrogressive language assistance procedures. The importance of Section 5 cannot be measured just by the number of objections, but also "the number of voting changes that have never gone forward as a result of Section 5." *Id.* at 24, *reprinted in* 2006 U.S.C.C.A.N. 633. Its "deterrent effect" is

"substantial." *Id.* In renewing Section 5, Congress examined evidence of "continued discrimination" including objections that were interposed, "requests for more information submitted followed by voting changes withdrawn from consideration," and actions brought to enforce the mandate in Alaska. VRARA §2(b)(4)(A), 120 Stat. 577. That evidence sustains the provision's constitutionality.

A. Alaska continues to evade the requirements of Section 5.

Petitioner's characterization of the record supporting Section 5 is deeply flawed, particularly as that evidence pertains to Alaska. Petitioner makes a categorical generalization that the VRA is "based on an illegitimate presumption of resolute intransigence," contending that "[t]he record Congress amassed in 2006 does not demonstrate that covered jurisdictions continue to evade enforcement." Petitioner's Br. at 2, 13. Petitioner's argument ignores the rich, detailed examples of covered jurisdictions such as Alaska that continue to evade the requirements of Section 5. *See* H.R.REP.NO. 109-478 at 41-44, *reprinted in* 2006 U.S.C.C.A.N. 646-48.

Congress received evidence demonstrating that State officials have been the single greatest barrier that Alaska Natives face. The House Report explained that while there had been "substantial strides ... toward racial equality, the attitudes and actions of some States ... continue to fall short." H.R.REP.NO.

109-478 at 56, *reprinted in* 2006 U.S.C.C.A.N. 657. Alaska's election officials demonstrated that recalcitrance. In 2006, Lieutenant Governor Loren Leman, who was responsible for administering elections, was presented with evidence of the State's lack of language assistance and failure to obtain preclearance for its English-only election procedures. Instead of investigating those issues, he rejected them after making a single telephone call to one English-speaking voter. *See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 109th Cong., 2d Sess., at 115, 116 (2006) (letter from Alaska Lt. Gov. Loren Leman) (commenting on *Continued Need*, *supra*, at 1308-62). He then informed the House that Alaska was "in compliance" and "[h]appily so" with the VRA. *Id.* at 115.

A federal court found otherwise in 2008, citing the State's lack of responsiveness in remedying discrimination against Alaska Natives and enjoining further violations of the Act. *See Nick* PI Order, *supra*. The evidence showed that the State's 1981 precleared language assistance plan had "never been complied with in Alaska," except for the narrow remedy for a single election in Barrow a decade earlier. *Modern Enforcement*, *supra*, at 26. In over three decades, Alaska had aired only two incomplete and poorly translated election announcements over the radio in Yup'ik, compelling private parties to

obtain self-help to get information. *Nick* PI Mot., *supra*, at 6-8. The State provided all voter registration and voting information in English-only, despite Alaska's use of touch-screen voting units capable of "speaking" eight different languages. *Id.* at 10-11. Between 2000 and 2007, translators generally were unavailable and untrained. *Id.* at 11-14. Alaska provided no Yup'ik translations, forcing poll workers to translate ballots written in college-level English "on the spot." That led to widely diverging translations that denied *amici* and other voters effective language assistance even when translators were available. *Id.* at 7, 15-16.

Alaska election officials began looking into implementing a language assistance program after being informed of their violations. However, the State Director of Elections "put it aside" to prepare for elections in 2006 and 2007. *Id.* at 20. She claimed, "Language assistance is not the only assistance that the Division of Elections provides.... We have ... the demands of every voter in the state. I think it would [be] important to balance all of those needs and our resources to be able to make that determination." *Id.* Alaska's justification is particularly telling. State officials view compliance with the VRA as optional or extraneous to an election, rather than an integral part of it. Therefore, LEP Yup'ik voters and tribal councils from the Bethel region were forced to sue the State in 2007 to obtain relief. *See* Dkt. 1, Compl., *Nick*, *supra* (filed June 11, 2007).

In July 2008, a federal court issued a preliminary injunction to bar Alaska from further violations of the VRA. *See Nick* PI Order, *supra*. The court found that "State officials became aware of potential problems with their language-assistance program in the spring of 2006," but their "efforts to overhaul the language assistance program did not begin in earnest until after this litigation." *Id.* at 8. The court reasoned that an injunction was needed for three reasons: (1) the State had been covered by Section (4)(f)(4) "for many years"; (2) "the State lacks adequate records to document past efforts to provide language assistance to Alaska Native voters"; and (3) the State's post-litigation efforts to come into compliance were "relatively new and untested." *Id.* Therefore, the court concluded that "the evidence of past shortcomings justifies the issuance of injunctive relief to ensure that Yup'ik-speaking voters have the means to fully participate in the upcoming State-run elections." *Id.* at 8-9. The *Nick* injunction remains in place today.

The U.S. Department of Justice also found strong evidence of Alaska's violations. The Department observed that the "last precleared bilingual election procedures" for Alaska Natives were under a plan "precleared by letter dated October 5, 1981." App. 6-13, Letter from Christopher Coates, Chief, Voting Section to Gail Fenumiai, Director, Division of Elections, dated Aug. 1, 2008. However, Department officials noted that discovery in *amici's* case against Alaska, "admissions by State elections officials," and assertions by officials in a letter withdrawing the

changes indicated that "Alaska is not currently fully implementing the 1981 plan and is instead implementing new and different procedures." *Id.* The Department requested that Alaska inform it of the action the State planned "to take regarding the changes affecting voting that have not been submitted for judicial review or preclearance." *Id.* State officials ignored the Department's request. *Amici* therefore were compelled to pursue their Section 5 claim against Alaska, which has been stayed pending the Court's decision in this case.

Alaska's bailout history likewise reflects the State's evasion of Section 5. "In 1982, Congress amended the bailout provision to encourage jurisdictions to end their discriminatory practices and to integrate minority voters into the electoral process." H.R.REP.NO. 109-478 at 25, *reprinted in* 2006 U.S.C.C.A.N. 634. The bailout standard requires that jurisdictions demonstrate that they have been free of voting discrimination for ten years. *See* 42 U.S.C. §1973b(a). Alaska unsuccessfully attempted to bailout in 1978 and 1984, but dismissed its lawsuit on both occasions after the evidence showed that the State denied equal electoral opportunities to Native voters. *See* Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 403, 415 (1985). Evidence of the State's present failure to comply with the VRA explains why. Alaska's covered status "has been and continues to be within the control of the jurisdiction." H.R.REP.NO. 109-478 at

25, *reprinted in* 2006 U.S.C.C.A.N. 634. However, its ongoing violations have made it clear that it is not a jurisdiction with "a genuinely clean record" that will allow it to terminate coverage. *Id.*

The congressional record in 2006 highlights the continuing need for Section 5 in Alaska. It does not suffer from "utter hollowness" that "ignores the reality of today's America," but instead reflects the reality that despite some important progress, much work is left to be done to fully integrate Alaska Natives into the political process. Petitioner's Br. at 43-44. Alaska's persistent failure to implement "the mandate placed on it in 1975" makes it "no less deserving of coverage today than it was in 1975." *Modern Enforcement*, *supra*, at 79.

B. More Information Requests prevent voting discrimination by Alaska.

More Information Requests (MIR) play an important role in preventing voting discrimination against Alaska Natives. MIRs are an "administrative mechanism" used by the Justice Department to obtain additional information needed to determine whether preclearance of a voting change is warranted under Section 5. H.R.REP.NO. 109-478 at 40, *reprinted in* 2006 U.S.C.C.A.N. 645. Their use forces "covered jurisdictions to take action" that can include withdrawing "a proposed change from consideration because it is discriminatory," submitting "a new or

amended non-discriminatory voting plan," or simply not making a change at all. *Id.*

Alaska routinely withdraws discriminatory voting changes after receiving an MIR, a pattern that has continued since reauthorization. In March 2008, Alaska attempted to circumvent the language claims brought in the *Nick* litigation. State officials made a short submission of a language plan without any explanation for their failure to implement the plan precleared by the Department in 1981. *See* First Am. Compl., *Nick*, *supra*, at Attachs. B-C. In May 2008, the Justice Department issued a detailed MIR letter identifying 16 categories of facts suggesting the absence of enforcement of the prior plan. *See* Dkt. 292 at Exh. 199, Letter from Christopher Coates, Acting Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, dated May 19, 2008, *Nick*, *supra*. Instead of responding, the State abruptly withdrew its submission, preventing implementation of its retrogressive procedures. *See* Dkt. 292 at Pls.' Exh. 271, Withdrawal Letter dated June 9, 2008, *Nick*, *supra*. In the process, Alaska derided the request, arguing that "DOJ's questions on past practices are inappropriate." Dkt. 249, at 9 n.19, Opp. to Mot. for Prelim. Inj., *Nick*, *supra*.

State officials later attempted to circumvent the MIR by submitting the State's changes piecemeal, which the Department also rejected. According to the Department, it was necessary to review the entire plan together to determine whether it provided effective equal registration and voting opportunities

to Alaska Natives. *See* App. 6-13. Alaska's experience with MIRs refutes Petitioner's argument that "a jurisdiction's voluntary abandonment of a change after a more-information request ... evidences an attempt to comply with constitutional guarantees, not to evade their enforcement." Petitioner's Br. at 53.

C. Polling place changes continue to discriminate against Alaska Natives.

Petitioner downplays the important role that Section 5 plays in preventing discrimination by requiring that all voting changes be submitted for preclearance. *See* 42 U.S.C. §1973c. Without citing any evidence to support its conclusion, Petitioner criticizes Section 5 for "not confining itself to such issues as redistricting but continuing to apply to the most minute and obviously benign changes like moving a polling place from a private garage to a public school." Petitioner's Br. at 14.

This Court has rejected the narrow impact that Petitioner contends that polling place changes can have on minority voter participation. *See Perkins v. Matthews*, 400 U.S. 379 (1971). The reason for requiring preclearance of polling place changes is apparent: "The abstract right to vote means little unless the right becomes a reality at the polling place on election day." *Id.* at 387. The Court reasoned that "there inheres in the determination of the location of polling places an obvious potential for 'denying or abridging the right to vote on account of race or color.'" *Id.* at

388. Consequently, the Court determined that it was "clear" that Section 5 "requires prior submission of any changes in the location of polling places." *Id.*

Evidence from Alaska demonstrates why polling place changes are not "obviously benign." Petitioner's Br. at 14. Native villages in many parts of the State, such as the Bethel region, are separated from each other by large expanses of water and frozen tundra without any roads to connect them. Some Native villages (such as Kasigluk) are divided by rivers, requiring that polling places be split for a half day on one side of the river and then transported by boat to voters living on the other side. *See Continued Need*, *supra*, at 1316. The State Division of Elections estimates that statewide there are about 150 Native villages that are inaccessible by road. *Id.* Relocating polling places in Alaska is "an incredibly big deal" because moving "a polling station in a community that does not have cars and operates by snow machines or walking in 10-below weather in November ... may actually disenfranchise an entire community." *Modern Enforcement*, *supra*, at 25.

Just last year, Section 5 prevented Alaska from implementing a number of discriminatory polling place changes. In May 2008, the State submitted for preclearance a plan to eliminate precincts in several Native villages covered by Section 4(f)(4) of the Act. *See* App. 1-5, Letter from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, dated July 14, 2008. State officials proposed to (1) "realign" Tatitlek, a community in which

about 85 percent of the residents are Alaska Native, to the predominately white community Cordova, which is located over 33 miles away and is not connected by road; (2) consolidate Pedro Bay, in which a majority of its residents are Alaska Native, with Iliamna and Newhalen, which are located approximately 28 miles away, are not connected by road, and were the subject of a critical initiative on the August 2008 ballot; and (3) consolidate Levelock, a community in which about 95 percent of the residents are Alaska Native, with Kokhanok, which are approximately 77 miles apart and not connected by road.[4] In summary, Alaska was attempting to combine precincts which are accessible to one another only by air or boat and have high concentrations of Alaska Native voters. *See id.*

The Justice Department responded to the State's submission with a MIR letter requesting information about the research on which the voting changes were based, the distances between the polling places, and their accessibility to Alaska Native voters. *See id.* For example, the Department inquired about "the methods of transportation available to voters traveling from the old precinct to the new consolidated precinct" asking that if there were no roadways connecting them that the State "indicate how voters will get

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[4] Population data is from the 2000 Census. *See* U.S. Census, http://www.census.gov/. Distance data is calculated using the Geographic Names Information System of the U.S. Geological Survey. *See* http://www.infoplease.com/atlas/calculate-distance.html.

to the consolidated location." *Id.* The MIR also suggested that Alaska's election officials had not consulted with Native voters about the changes and requested a "detailed description" of efforts "to secure the views of the public, including members of the minority community, regarding these changes." *Id.* Finally, the MIR documented that when Department personnel communicated with State officials, they learned that Alaska also was taking steps to implement an unsubmitted voting change that would designate "the specified voting precincts" as "permanent absentee by-mail precincts." *Id.* Rather than respond to these questions and submit the additional voting changes for Section 5 review, the State abruptly withdrew the submission two weeks later. *See* App. 14-15, Letter from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, dated Sept. 10, 2008.

The record from Alaska shows that preclearance remains necessary to block State officials from enforcing polling place changes that would disenfranchise Alaska Native voters.

D. A Section 5 objection in Alaska has lasting impact in deterring future discrimination against Alaska Natives.

In Alaska, a Section 5 objection does not just stop enforcement of the discriminatory voting change at issue. It also discourages State officials from attempting to enforce similar discriminatory changes in the

future. Petitioner downplays that deterrent effect, arguing that there is "no evidence ... that officials in covered jurisdictions would revert to the conduct of their forbears if §5 were allowed to expire." Petitioner's Br. at 42-43. Arriving at that conclusion sidesteps the substantial record that Congress considered regarding the deterrent effect of objections. With respect to Alaska, that deterrent effect does not just prevent State officials from reverting to discrimination by their forbears, but the discriminatory conduct in which they would continue to engage themselves without Section 5.

The Attorney General's objection to a statewide redistricting plan following the 1990 Census illustrates the lasting deterrent effect that a Section 5 objection has in Alaska. The State's initial plan, which was prepared in secret, diluted the voting strength of Alaska Natives. *See Continued Need*, *supra*, at 1345-46. Several Native groups complained to the Justice Department about the "anti-Native" plan. *Id.* at 1346-47. The Department responded by sending an MIR asking that the State address concerns such as: the plan's reduction of the number of Alaska Native majority districts; the retrogressive effects of at least one district on Native voting strength; the "extraordinary" deference towards incumbent legislators' districts except those of Native legislators, whose districts had been combined; and the State's preparation of the redistricting plan without public input. *Id.* at 1347.

A State trial court subsequently rejected the original redistricting plan as unconstitutional. *Id.* The Alaska Supreme Court then ordered the trial court to formulate an interim plan. *Id.* In *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992), the State's highest court struck down 11 districts in the interim plan, but left intact State District 36, which reduced the voting strength of Yup'iks. *Continued Need*, *supra*, at 1347. In 1993, the Attorney General interposed an objection to the retrogressive effects of District 36 and its companion Senate District R, which reduced the Native voting age population from 55.7 percent to 50 percent despite the presence of extremely racially polarized voting in those districts. *Id.* at 1348. Section 5 thereby served as the only line of defense between the retrogressive redistricting plan and its discriminatory impact on Alaska Natives. *Id.*

As a result of the 1993 objection, Alaska was compelled to take "an entirely different approach to the process" in the 2000 redistricting cycle. *Modern Enforcement*, *supra*, at 81. It "hired a national voting rights expert to ensure that its proposed plan did not violate the VRA or reduce the ability of Alaska Natives to elect candidates of their choice." *Id.* State officials adopted a plan that did not "reduce the ability of Alaska Natives to elect candidates of their choice" and appointed a Native to the redistricting board to represent the nearly 20 percent of the State's population excluded from the 1990 redistricting process. *Id.*; *see Continued Need*, *supra*, at 1318-19,

1350-51. That one "objection was felt statewide and continues to have an impact today." *Modern Enforcement*, *supra*, at 81.

Petitioner's argument suggests that a Section 5 objection should be treated as an isolated occurrence that has no deterrent effect on a covered jurisdiction's future actions. The House Report rejected that narrow view of Section 5's role, referring to the impact of an objection in Georgia that closely parallels the result of the 1993 objection in Alaska:

> This does not mean, however, that Section 5 did [not] play a critical role in the redistricting process. Rather, it means Section 5 encouraged the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters, and that it would not become embroiled in the preclearance process.

H.R.REP.NO. 109-478 at 24, *reprinted in* 2006 U.S.C.C.A.N. 633. Alaska's post-reauthorization violations of Section 5 are a strong indication that State officials would readily return to their discriminatory conduct if they did not have to obtain preclearance.

II. Other substantive provisions of the VRA are inadequate substitutes for Section 5.

Section 5 is a central feature in the VRA's arsenal to combat existing voting discrimination and the present effects of past unequal treatment in Alaska.

Other substantive provisions of the Act play an important role as well. However, they remain far less effective than the broad prophylactic relief that preclearance provides in preventing discriminatory voting changes from ever being implemented. Yet, Petitioner asks the Court to reject the role of Section 5 in its entirety because Petitioner asserts that "private action is more effective than executive review." Petitioner's Br. at 54.

Petitioner's argument is fundamentally at odds with longstanding precedent. This Court recognized that Congress could remedy discrimination in an "inventive manner" as it did in Section 5. *South Carolina v. Katzenbach*, 383 U.S. at 327. Specifically, the VRA implemented the preclearance remedy "without any need for prior adjudication" because a case-by-case approach in challenging discriminatory tests and devices had proven unworkable. *Id.* at 328. Voting suits were "unusually onerous to prepare" and litigation of individual cases was "exceedingly slow." *Id.* at 314. When the cases were successful, states would simply switch to a new discriminatory test, device, or procedure. *Id.* Therefore, the Court concluded that "Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.* at 328.

Amici's experience in the *Nick* litigation confirms the continuing vitality of the Court's reasoning in *Katzenbach*. Almost two years after filing their claims under Sections 4(f)(4) and 208 of the VRA, *amici* have spent nearly $150,000 in out-of-pocket

costs, dedicated thousands of hours by four experienced attorneys, employed four expert witnesses and five translators, completed nearly 20 depositions, and traveled thousands of miles back and forth across the frozen tundra in hazardous winter months. *Amici* have had to sacrifice their subsistence fishing to travel 500 miles to Anchorage to pursue their claims. The parties have exchanged over 7,000 pages of documents. There are now nearly 600 docket entries in the record of a single case that the presiding federal judge refers to as "vigorous." Still, *amici* have not obtained final relief. In February 2009, *amici* had to file a comprehensive motion supported by more than three dozen declarations from Native voters in 17 villages because of the State's failure to comply with the more limited remedies ordered in the preliminary injunction. *See* Dkt. 518, Mot. for Further Relief, *Nick*, *supra*. After *amici* obtain final relief in their case, that relief will only apply to the approximately 15,000 Alaska Natives living in the Bethel Census Area, and not to tens of thousands of Alaska Natives residing in other parts of the State. Far from being quick and effective as Petitioner maintains, *amici's* experience has proven the model of protracted, intense and costly litigation that *Katzenbach* described as antithetical to the fundamental right to vote. *See* 383 U.S. at 327-28.

III. Educational discrimination that depresses Native turnout shows the closeness of fit between the Section 4 trigger and statewide coverage of Alaska.

Petitioner contends that the Section 4 coverage formula improperly "relies on two proxies in attempting to identify jurisdictions with histories of voting discrimination: (1) literacy tests or other devices that prohibited voting, and (2) voting registration and turnout rates." Petitioner's Br. at 58 (citing 42 U.S.C. §1973b(b)). Without addressing the considerable record that Congress assembled in 2006, Petitioner maintains that these "proxies are out of date and cannot show a recent" relationship with ongoing discrimination. *Id.* at 58-59. Petitioner's argument is refuted by this Court's jurisprudence and evidence from Alaska showing the trigger's closeness of fit with discrimination against Alaska Natives.

The preclearance requirements in Section 5 of the VRA apply to jurisdictions covered under the formula in Section 4 of the Act. As originally enacted, the Section 4 trigger focused on states and locales that had used literacy tests and experienced low voter registration or turnout. *See* Pub. L. No. 89-110, §4(a)-(b), 79 Stat. 437, 438 (1965). The Act defined "test or device" to include any prerequisites to registering or voting that required demonstration of "the ability to read, write, understand, or interpret any matter," to prove education achievement or knowledge of any subject, possession of "good moral character," or to prove qualifications "by the voucher of registered

voters, or members of any other class." 42 U.S.C. §1973b(c). In 1975, Congress amended the Section 4 trigger to include Alaska Natives and other minority voters who had experienced discrimination that impeded their political participation.

The trigger for Alaska Natives is "virtually identical" to the original trigger in Section 4, except that it expanded the term "test or device" to "also mean the use of English-only election materials in jurisdictions where more than 5 percent of the voting age citizen population is comprised of members of any single language minority group."[5] 121 CONG. REC. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards); *see* 42 U.S.C. §1973b(b). Application of the triggering formula resulted in statewide coverage of Alaska for Alaska Natives. *See* 40 Fed. Reg. 49,422 (Oct. 22, 1975). Because of its coverage, Alaska must provide all election materials in the Alaska Native languages. *See* 42 U.S.C. §1973b(f)(4). The State also must obtain Section 5 preclearance of any voting change different from what was in force or effect on November 1, 1972, *see* 42 U.S.C. §1973c(a), including any changes necessary to provide effective language assistance. *See* 28 C.F.R. §55.22. Administrative preclearance of the State's voting changes remains essential to protect the fundamental right of the *amici* to participate in the political process.

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[5] *See* 42 U.S.C. §1973b(f)(3). "Language minorities" was defined as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 42 U.S.C. §1973l(c)(3).

Congress amended the coverage trigger in Section 4 because of overwhelming evidence of "a systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English." S.REP.NO. 94-295 at 24 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 790. Intentional discrimination against language minorities was combined with educational discrimination "resulting in severe disabilities and continuing illiteracy in the English language." 42 U.S.C. §1973b(f)(1). Congress responded by applying "the Act's special remedies to jurisdictions where language minorities reside in greatest concentrations and where there is evidence of low voting participation." S.REP.NO. 94-295 at 32 (1975), *reprinted in* 1975 U.S.C.C.A.N. 798. The statutory findings declare that, "in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices." 42 U.S.C. §1973b(f)(1).

This Court repeatedly has upheld the Section 5 triggers, narrowed by the bailout provision, as a constitutional exercise of congressional powers to protect the fundamental right to vote. *See Lopez v. Monterey County*, 525 U.S. 266, 283 (1999); *City of Rome v. United States*, 446 U.S. 156, 177 (1980); *South Carolina v. Katzenbach*, 383 U.S. 308, 325-27 (1966). In a quartet of decisions, the Court also determined that Congress reasonably exercised its

authority in remedying the discriminatory effects of English literacy tests and unequal educational opportunities in covered jurisdictions. *See Oregon v. Mitchell*, 400 U.S. 112 (1970) (unanimously upholding the nationwide ban on literacy tests); *Gaston County v. United States*, 395 U.S. 285, 291-92 (1969) (upholding the Section 5 coverage formula based upon voter participation rates as a proxy for identifying jurisdictions with "racially disparate school systems"); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding the requirement that jurisdictions provide language assistance for Puerto Rican voters educated in Spanish); *South Carolina v. Katzenbach*, 383 U.S. at 314, 327-30 (upholding the Section 5 trigger as a permissible way to identify jurisdictions with a "significant danger" of voting discrimination, as documented by "a low voting rate").

Amici and other Alaska Natives are a testament to the relationship between Alaska's coverage under Section 4 and continuing discrimination against them by the State. Set against the well-established framework for remedying the effects of unequal educational opportunities, the continuing coverage of Alaska under the Section 4 trigger is constitutional. *Amici* and other Alaska Natives were denied access to public schooling, resulting in their high illiteracy and LEP rates. Coupling that discrimination with Alaska's use of English-only elections has resulted in low voter participation rates. Instead of invalidating the efficacy of the Section 4 trigger, Petitioner's argument reaffirms it.

A. Alaska has denied equal educational opportunities to Alaska Natives.

Amici and other Alaska Natives face "present barriers to equal educational opportunities" and "the current effect that past educational discrimination has on today's ... adult population." S.REP.NO. 102-315 at 5 (1992). Segregated schooling was the norm in Alaska for over a century, and was a reality for *amici* when they wanted to attend public school but could not. *See* Settlement Agreement, *Hootch v. State Operated Sch. Sys.*, Civil No. 72-2450, *settled sub nom., ex rel. Tobeluk v. Lind* (Alaska Super. Ct. Sept. 3, 1976) (*Hootch* Settlement). Specifically, "a dual school system emerged unofficially in Alaska" because of "resentment among the relatively few whites over emphasis on education for Natives and a belief that integrated schools would give only inferior education." *Id.* at ¶9. In 1956, Alaska's territorial attorney general indicated that the territory had not created school districts in Alaska Native areas, despite the territory's clear authority to do so. *See* U.S. Dep't of Interior, *Organization of School Districts on Indian Reservations in Alaska*, 63 Interior Dec. 333, 335 (Sept. 17, 1956).

In 1959, the year Alaska became a state, out of 34 public secondary schools operated by the territorial government, just six were in communities in which at least half of the population was Alaska Native. *Hootch* Settlement at ¶12. By 1960, just 1,832 out of 5,365 Native children between the ages of 14 and 19 were enrolled in high school. State of Alaska,

Governor's Comm. on Educ., *An Overall Education Plan for Rural Alaska* 2 (rev. Feb. 26, 1966), at App. E. By the mid-1970s, there were about 2,783 secondary school age children who lived in villages with a public or Bureau of Indian Affairs elementary school but without a secondary school or daily access to such a school. Over 95 percent of those children were Native; statewide, only 120 non-Native children of secondary school age had no ready access to a secondary school. *Hootch* Settlement at ¶19. If Native children did not "wish to leave home, [were] not able to leave home, or refuse[d] to leave home to attend boarding school or the boarding home program, they [were] denied secondary school education," resulting in "a highly disproportionate number of Alaska Natives ... not ... attending secondary schools." First Am. Compl. ¶51, *Hootch v. State Operated Sch. Sys.*, case no. 72-2450-CIV (Alaska Super. Ct. Oct. 5, 1972). *Amici* therefore received no schooling past the fifth primary grade.

In *Hootch v. State Operated School System*, a class of Eskimo, Aleut, and Indian parents and children from some of the *amici's* villages sued the State to remedy the separate and unequal schooling.[6] *Id.* The case was settled in 1976, when Alaska agreed for the first time to establish a public secondary school in all 126 Native villages that wanted one, including the

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[6] The Senate cited *Hootch* as evidence of educational discrimination that necessitated amending the Section 4 trigger to include Alaska Natives. *See* S.REP.NO. 94-295 at 29, *reprinted in* 1975 U.S.C.C.A.N. at 795-96.

amici's own villages. *See Hootch* Settlement. It took Alaska nearly three decades to begin to implement the mandate of *Brown v. Board of Education*, 347 U.S. 483 (1954). Secondary schools were unavailable in most Native villages until the early 1980s, when Alaska's legislature approved $137 million to provide secondary education in 105 villages and to build 92 new high schools. Stephen E. Cotton, *Thirty Years Later: The Molly Hootch Case*, SHARING OUR PATHWAYS vol. 9, issue 4, at 4, 9 (Sept./Oct. 2004). Construction of the last of the so-called "Molly Hootch" high schools was not completed until the mid-1980s. Diane Olthuis, *The Molly Hootch Case: 1972, Emmonak*, in IT HAPPENED IN ALASKA 129 (2006).

Building schools did not end the State's discrimination. In 1999, *Kasayulie v. State* found that Alaska had "discrepancies in funding made available to Native and non-Native students." H.R.REP.NO. 109-478 at 51, *reprinted in* 2006 U.S.C.C.A.N. 651. Despite "the affirmative duty on the State to provide public education," the court held that the funding discrepancies between the predominately non-Native urban areas and the Native villages "unconstitutionally discriminated against Alaska Natives." *Id.* There was evidence of ongoing funding disparities in another case that was pending during reauthorization. *See Continued Need*, *supra*, at 1336; Decision and Order, *Moore v. State*, case no. 3AN-04-9756-CIV slip op. at 194-95 (Alaska Super. Ct. June 21, 2007).

Alaska's continued failure to provide equal educational opportunities has profoundly affected the

ability of Native voters to read registration and voting materials. In 2004, only 47.5 percent of all Native students graduated from high school compared to the statewide average of 62.9 percent. H.R.REP.NO. 109-478 at 50-51, *reprinted in* 2006 U.S.C.C.A.N. 651. In 2005, just 19.5 percent of all Alaska Native seniors statewide "were proficient in reading comprehension" in a high school graduation test. *Continued Need*, *supra*, at 1335; *Modern Enforcement*, *supra*, at 79. Educational discrimination in Alaska is not limited only to *amici*, but now impacts a new generation of young adults who are or soon will become eligible to vote.

B. Alaska Natives continue to suffer from high illiteracy rates and low voter participation resulting from discrimination in education and voting.

Where education barriers are present, they have "a deleterious effect on the ability of language minorities to become English proficient and literate." H.R.REP.NO. 102-655, at 6, *reprinted in* 1992 U.S.C.C.A.N. 766, 770. Alaska Natives suffer from the effects of present unequal educational opportunities and past discrimination identified by Congress in 1975. According to 2002 Census data, the average LEP rate among Alaska Native voters on 59 reservations was 22.6 percent. *See Continued Need*, *supra*, at 2169. Forty percent of all Alaska Native reservations had LEP rates "greater than 50 percent." *Id.* Among LEP Alaska Native voters, 28.3 percent are illiterate,

nearly 21 times the national illiteracy rate of 1.35 percent for voting-age U.S. citizens. *See id.* at 2163, 2170. There is a strong correlation between limited-English proficiency and illiteracy, with forty percent of all Alaska Native reservations having "illiteracy rates greater than 50 percent." *Id.* at 2170.

Alaska Natives in the Bethel area have some of the highest LEP rates in Alaska, including eight Yup'ik villages in which more than half of eligible voters are LEP and 10 villages with LEP rates between 20 to 50 percent. *See Id.* at 2281. Among the region's Alaska Natives aged sixty and older, 91.7 percent lack a high school diploma and 86.3 percent have less than a ninth grade education. *See Nick* PI Mot., *supra*, at 4. Yup'ik voters in the Bethel area have consistently had depressed voter turnout because of the lack of language assistance, trailing statewide turnout in the 2004 Presidential Election by more than 20 percent. *Id.* at 24. Alaska election officials were dismissive of the known impact their violations of the VRA had on depressing Yup'ik turnout in the Bethel area, stating their lack of concern "because that has been the trend of that area." *Id.* at 23-24. In the 2008 Presidential Election, turnout among Alaska Natives was just 47 percent,[7] nearly 20

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[7] *See* Nat'l Cong. of Am. Indians, *Election 2008: Impact in Indian Country* (Nov. 6, 2008), http://www.ncai.org/fileadmin/pdf Election2008AnalysisFINALCompatibilityMode.pdf.

percent lower than the statewide turnout rate of 66 percent.[8]

"Sections 4(f) and 203 have been instrumental in fostering progress" to combat the "unequal educational opportunities" provided to Alaska Natives. H.R.REP.NO. 109-478 at 18, *reprinted in* 2006 U.S.C.C.A.N. 628. They "level the playing field" for illiterate and LEP Native voters, "ensuring that the most fundamental right of all citizens is preserved regardless of one's ability to speak English well." *Id.* at 61, *reprinted in* 2006 U.S.C.C.A.N. 661-62. Section 4(f)(4) requires that Alaska provide assistance in Alaska Native languages for "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots..." 42 U.S.C. §1973b(4)(f)(4); *see also* 42 U.S.C. §1973aa-1a (providing for identical requirements under Section 203); 28 C.F.R. §55.18 (summarizing language assistance that must be provided under both sections).

Alaska is demonstrative of the "significant number of jurisdictions" that "have yet to fully comply" with Section 4(f)(4)'s obligations. H.R.REP.NO. 109-478 at 58, *reprinted in* 2006 U.S.C.C.A.N. 659. Alaska's violations have "had the effect of keeping citizens from experiencing full participation in the

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[8] *See* State of Alaska, Division of Elections, Official Results of the Nov. 4, 2008 General Election, http://www.elections.alaska.gov/08general/data/results.pdf.

electoral process." *Id.* at 58-59, *reprinted in* 2006 U.S.C.C.A.N. 659. In reauthorizing Section 4(f)(4), Congress cited "the enforcement actions filed to protect language minorities" such as those to compel Alaska's compliance. VRARA §2(b)(8), 120 Stat. 578. Petitioner's criticism of the Section 4 trigger rests on the incorrect assumption that the passage of time, rather than eliminating the discrimination that resulted in coverage, should be the constitutional touchstone. Jurisdictions like Alaska "are covered because they discriminated against their minority populations. They should not be released from oversight simply because time has passed; they should be released if they can demonstrate that they are no longer discriminating, such as through bailout." *Modern Enforcement*, *supra*, at 74. Section 5 remains essential to ensure that Alaska provides all of its citizens, including Alaska Natives, with equal access to registration and voting.

IV. Conclusion.

Sections 4 and 5 of the VRA are essential to protect the ability of Alaska Natives to have equal access to registration and voting opportunities. State discrimination continues to be a part of the contemporary reality of elections in Alaska. Congress was well aware of that fact when it reauthorized the temporary provisions of the VRA in 2006. *See* VRARA §2(b)(b), 120 Stat. 577-78. As such, it properly acted "under its broadest power – to remedy continued

discrimination." H.R.REP.NO. 109-478 at 53, *reprinted in* 2006 U.S.C.C.A.N. 654.

Accordingly, the judgment of the District Court should be affirmed.

Respectfully submitted,

JAMES THOMAS TUCKER
Counsel of Record
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NATIVE AMERICAN RIGHTS FUND
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(907) 276-0680

25th of March 2009

[SEAL]

U.S. Department of Justice
Civil Rights Division

CC:MSR:SMC:jdh
DJ 166-012-3
2008-2739
2008-3714

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

July 14, 2008

Gail Fenumiai, Esq.
Director, Division of Elections
P.O. Box 110017
Juneau, Alaska 99811-0017

Dear Ms. Fenumiai:

This refers to the consolidation of the Tatitlek Precinct into the Cordova Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Cordova-Tatitlek Precinct; consolidation of the North Prince of Wales Precinct into the Klawock Precinct, and the subsequent polling place change, and precinct realignment; consolidation of the Pedro Bay Precinct into the Iliamna-Newhalen Precinct, and the subsequent polling place change precinct realignment and precinct name change to the Iliamna Lake North Precinct; and the consolidation of the Levelock Precinct into the Kokhanok Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Iliamna Lake south Precinct, for the State of Alaska, submitted to the Attorney General pursuant to Section 5 of the Voting

Rights Act, 42 U.S.C. 1973c. We received your submission on May 13, 2008.

With regard to the changes affecting the North Prince of Wales Precinct, the Attorney General does not interpose any objection to the specified change. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.41).

With regard to the remaining specified changes, our analysis indicates that the information sent is insufficient to enable us to determine that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under Section 5. The following information is necessary so that we may complete our review of your submission:

1. A detailed explanation of the proposed changes including: (a) the criteria used to determine that the Tatitlek, Pedro Bay and Levelock Precincts should be eliminated; (b) reasons for the selection of the precincts these would be consolidated into; (c) a description of any alternative(s) precincts considered for the consolidation and the reason(s) why each such alternative was not recommended or approved; and (d) the factual basis, including any reports, studies, analyses, or views (whatever formal or informal), for

the State's determination that the proposed changes will not have a retrogressive effect on minority voters.

2. A map for each of the consolidations, which depicts the existing voting precincts and the locations of their current polling places, and any other locations considered as potential polling places for these consolidated precincts. The maps should be accompanied by a listing of the names and addresses of the current polling place locations along with the distance between each current location and the location with which it is being consolidated.

3. Please indicate the methods of transportation available to voters traveling from the old precinct to the new consolidated precinct. If no roadways connect the two, please indicate how voters will get to the consolidated location.

4. Please provide any methodology the State used to determine that there are no Alaskan Native-speakers in the impacted precincts, which are covered by the provisions of Section 203 of the Voting Rights Act. Please provide names of community members spoken to regarding the presence or absence of limited-English proficient voters, including their daytime telephone numbers.

5. A detailed description of the efforts, both formal and informal, made by the State to secure the views of the public, including members of the minority community, regarding these changes. Describe the substance of any comments or suggestions received, provide the names and daytime telephone numbers of

the persons making the comments or suggestions, and articulate the State's response, if any.

6. Voter registration and turnout data, by race, for elections since 1998 for the precincts being eliminated and subsequently consolidated.

During your recent conversation with Ms. Stephanie Celandine, of our staff, regarding these consolidations, you noted that the specified voting precincts affected by the consolidations would be designated as *permanent* absentee by-mail precincts. According to our records, this change affecting voting has not been submitted to the United States District Court of the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. If our information is correct, it is necessary that this change be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that it does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable without Section 5 preclearance. *Clark v. Roemer*, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.10).

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. See the Procedures

for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.37). However, if no response is received within sixty days of this request, the Attorney General may object to the proposed changes consistent with the burden of proof placed upon the submitting authority. See also 28 C.F.R. 51.40 and 51.52(a) and (c). Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. Therefore, please inform us of the action the State of Alaska plans to take to comply with this request.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, you should call Ms. Celandine of our staff. Refer to File Nos. 2008-2739 and 2008-3714 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

/s/ Maureen S. [Illegible]
for Christopher Coates
Chief, Voting Section

[SEAL]

U.S. Department of Justice
Civil Rights Division

CC:TFM:SBD:LB:jdh
DJ 166-012-3
2008-1726

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

August 1, 2008

VIA FACSIMILE & FIRST CLASS MAIL

Gail Fenumiai
Director
Division of Elections
State of Alaska
P.O. Box 110017
Juneau, Alaska 99811-0017

Dear Ms. Fenumiai:

This refers to the changes in bilingual election procedures for the State of Alaska ("State"), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our May 19, 2008 request for additional information on June 9, 2008.

Your June 9, 2008, letter withdraws your submission of the State's revised Minority Language Assistance Program ("MLAP") from Section 5 review. Accordingly, no determination by the Attorney General is required concerning this matter. *See Procedures for the Administration of Section 5 of the Voting Rights Act*, 28 C.F.R. 51.25(a). Please be advised, however, that the State of Alaska is required to provide bilingual election materials and minority

language assistance in the Native American and Alaska Native languages under Sections 4(f)(4) and 203 of the Voting Rights Act. Therefore, to the extent that the State seeks to implement new procedures, preclearance of those procedures will be required before they may be implemented.

The last precleared bilingual election procedures for the State are the 1981 plan for the Alaska Native languages, precleared by letter dated October 5, 1981, and the 2002 and 2003 plans for the Tagalog language, precleared by letters dated October 22, 2002 and November 17, 2003. However, according to discovery conducted in the case, *Nick, et al. v. Bethel, et al.* (D. AK, 3:07-CV-00098-TMB) ("*Nick*"), admissions by State elections officials, and assertions in your letter dated June 9, 2008, regarding "conditions existing at the time of the submission" and the State's continued implementation of "enhancements," it appears that the State of Alaska is not currently fully implementing the 1981 plan and is instead implementing new and different procedures. Any procedures deviating from the prior precleared procedures are changes affecting voting for which preclearance is required. *See Clark v. Roemer*, 500 U.S. 646 (1991).

According to our records, some of those changes affecting voting in the state's minority language program that have been implemented since 1981 have not been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act. If

our information is correct, it is necessary that these changes either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that they do not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable without Section 5 preclearance. *Id.*; 28 C.F.R. 51.10.

Should you elect to make a submission to the Attorney General for administrative review rather than seek a declaratory judgment from the District Court for the District of Columbia, it should be made in accordance with Subparts B and C of the procedural guidelines, 28 C.F.R. Part 51. At that time we will review your statewide bilingual procedures; however, any documentation previously provided need not be resubmitted.

The State of Alaska has recently submitted portions of its statewide bilingual procedures for Section 5 review in submissions dated June 2, 2008 (bilingual assistance forms and posters), June 10, 2008 (bilingual vote-by-mail materials), June 13, 2008 (bilingual vote-by-mail instructions), June 23, 2008 (Native Language and Tagalog audio on voting machines, and Native language audio CDs in polling places), and July 21, 2008 (using Native language audio CD recordings on automated phone system and website). With regard to these changes, please refer to the separate letter to you dated today, in which we state that it would be inappropriate for the Attorney

General to make a preclearance determination until the related changes have been submitted for Section 5 review.

We are aware of the Order entered on July 30, 2008, in the *Nick* litigation, requiring the State to implement certain bilingual elections procedures within the Bethel Census Area in the Yup'ik language. While those specific federal court-ordered procedures do not have to be submitted for Section 5 review, any procedures outside the scope of the Order that are changes affecting voting are legally unenforceable without Section 5 preclearance. *Id.*

Additionally, your letter dated June 9, 2008, contains some misconceptions regarding the Section 5 process, specifically the standard and scope of review of Section 5 submissions by the Attorney General, the process involving comments from outside parties, and reason for and purpose of the more information letter.

The Voting Rights Reauthorization Act of 2006[1] made clear that the standard of review under Section 5 includes any discriminatory purpose and not simply "retrogressive purpose" as explained in *Reno v. Bossier Parish School Board,* 528 U.S. 320 (2000). The applicable legal standard for determining whether discriminatory purpose exists is *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,

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[1] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, 5(c), 120 Stat. 577, 581

429 U.S. 252, 266 (1977). This approach requires an inquiry into 1) the impact of the decision; 2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; 3) the sequence of events leading up to the decision; 4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and 5) contemporaneous statements and viewpoints held by the decision-makers. *Id.* at 266-68.

Likewise, the discriminatory effect of a voting change must be measured by whether there is retrogression from a "benchmark" practice which is legally enforceable under Section 5, either by virtue of having been precleared or not being subject to preclearance. The Attorney General's review of a submission thus requires the covered jurisdiction to accurately and completely identify the relevant benchmark practice. 28 C.F.R. 51.27(b), 51.54.

The Supreme Court has emphasized with respect to a covered jurisdiction that seeks judicial or administrative preclearance of a voting change under Section 5, "irrespective of which avenue of preclearance the covered jurisdiction chooses, it has the same burden of demonstrating that the changes are not motivated by a discriminatory purpose and will not have an adverse impact on minority voters . . . " *McCain v. Lybrand*, 465 U.S. 236, 247 (1984).

A request for more information, like the Department's May 19, 2008 letter, seeks to assist the submitting jurisdiction in meeting its burden of establishing an absence of discriminatory purpose and discriminatory effect, where such information was not clearly presented in the initial submission. Therefore, the questions contained in the May 19, 2008 letter are relevant to the Section 5 analysis and necessary for the Attorney General to determine whether the submitted changes were motivated by any discriminatory purpose or will have a discriminatory effect as compared to the relevant benchmark. Moreover, we believe that the State of Alaska's response to the questions contained in the May 19, 2008 letter are necessary for the Department to review the State's submissions relating to or including bilingual election procedures, and to make a determination as to discriminatory purpose and retrogressive effect.

Likewise, the scope of review of Section 5 submissions by the Attorney General is broad and includes all information and documentation before him, including information provided by the submitting jurisdiction, information provided by outside parties in the form of comment, and any other relevant information obtained through a variety of public and internal means. 28 C.F.R. 51.26 through 51.30. In its letter dated March 18, 2008, the State informed the Attorney General that it was involved in the *Nick* private litigation regarding the very issues submitted for review. Court filings in that litigation are publicly available and were reviewed during the Attorney

General's consideration of the State's submission, as were comments from third parties.

The Procedures for Section 5 review contemplate and encourage comments from third parties and the Attorney General reviews, as a matter of course, those comments received during the sixty day period. 28 C.F.R. 51.26 through 51.33. Both the Section 5 Procedures and the Freedom of Information Act, 5 U.S.C. 552, allow for persons outside of the Department to obtain a copy of the submission and any comments upon request, subject to certain restrictions of privacy and confidentiality. 28 C.F.R. 51.29. An individual or group who provides information concerning a change affecting voting may choose to keep their identity confidential. 28 C.F.R. 51.29(d). Additionally, the Attorney General may, in his discretion, inform the submitting authority of comments made by third parties, as was done in this matter. 28 C.F.R. 51.36. However, no jurisdiction has a standing request to be notified of all comments received for all submissions.

Lastly, the Section 5 Procedures provide a means for the Attorney General to seek clarification and additional information from a jurisdiction, when necessary, including when issues are raised during the sixty-day review process or information provided by the submitting authority is insufficient. 28 C.F.R. 51.37. Such procedures also allow the jurisdiction and opportunity to respond to and rebut allegations so that the Attorney General can make a fully informed determination. *Id.* During the review of the State's

submission dated March 18, 2008, those issues set forth in the Department's letter dated May 19, 2008, came to light and the Attorney General sought the State's response to and clarification of same.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Alaska plans to take regarding the changes affecting voting that have not been submitted for judicial review or preclearance. If you have any questions, you should call Ms. Lema Bashir (202-305-0063) of our staff. Please refer to File No. 2008-1726 in any response to this letter so that your correspondence will be channeled properly.

Since the Section 5 status of Alaska's minority language assistance program is before the court in *Nick, et al. v. Bethel, et al.* (D. AK, 3:07-CV-00098-TMB), we are providing a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ [Illegible]
for
Christopher Coates
Chief, Voting Section

cc: Court and Counsel of Record

[SEAL]

U.S. Department of Justice
Civil Rights Division

CC:MSR:SMC:par
DJ 166-012-3
2008-2739
2008-3714

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

September 10, 2008

Ms. Gail Fenumiai
Director, Division of Elections
P.O. Box 110017
Juneau, Alaska 99811-0017

Dear Ms. Fenumiai:

This refers to the consolidation of the Tatitlek Precinct into the Cordova Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Cordova-Tatitlek Precinct; consolidation of the Pedro Bay Precinct into the Iliamna-Newhalen Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Iliamna Lake North Precinct; the consolidation of the Levelock Precinct into the Kokhanok-Iguigig Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Iliamna Lake South Precinct; and resulting designation of the Tatitlek, Pedro Bay and Levelock Precincts as permanent absentee by-mail precincts for the State of Alaska, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your

response to our July 14, 2008, request for additional information on July 30, 2008.

Your July 30, 2008, letter withdraws your submission from Section 5 review. Accordingly, no determination by the Attorney General is required concerning this matter. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.25(a)).

Sincerely,

/s/ Maureen S. [Illegible]
for Christopher Coates
Chief, Voting Section

AMICUS CURIAE BRIEF

No. 08-322

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF APPELLEES

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Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST[1]

The American Bar Association ("ABA") is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's more than 400,000 members span all 50 states and other jurisdictions,

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made such a monetary contribution. This brief is filed with the consent of all the parties.

and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

As the national voice of the legal profession, the ABA has taken on a special responsibility for protecting the rights guaranteed by the Constitution and fostering the rule of law. As an active voice in promoting full and equal access to our nation's electoral process, the ABA has adopted a number of policies opposing discrimination against minorities, including at the ballot box. *See, e.g., ABA 2005 Report with Recommendation #108,* Report at 1 & n.4 (Policy adopted August 2005).[3] The ABA has also participated as *amicus curiae* before this Court in cases delineating the scope of Congress's power under the

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to its filing.

[3] *Available at* http://www.abanet.org/leadership/2005/annual/dailyjournal/108.doc. The ABA's House of Delegates ("HOD") is the ABA's policymaking body and is comprised of more than 500 delegates. Reports with Recommendations may be submitted to the HOD by ABA delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members and the Attorney General of the United States, among others. The full HOD votes on the Recommendations. Those Recommendations that are adopted become ABA policy. *See* ABA Leadership, House of Delegates, General Information, *available at* http://www.abanet.org/leadership/delegates.html.

Reconstruction Amendments, including *Tennessee* v. *Lane*, 541 U.S. 509 (2004), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).

The ABA has a special interest in this case because it has long had an official policy of supporting the Voting Rights Act (the "Act" or the "VRA"), a critical piece of legislation that "has been called the most effective civil rights law ever enacted." *ABA 2006 Report with Recommendation*, Report at 1 (Policy adopted June 2006) (available from the ABA).[4] More than 25 years ago, the ABA's House of Delegates adopted a resolution supporting the 1982 extension of Section 5 of the VRA,[5] emphasizing that that key provision has "not only enhanced the political posture of minority groups, but it has also advanced the very ideals that make our country's governmental system unique in political history." *ABA 1981 Report with Recommendation #105*, Report at 6 (Policy adopted August 1981) (available from the ABA). The ABA therefore called upon "Congress, the legal profession and all Americans * * * to continue this vital tool until there is no institutional practice in this country barring or discouraging citizens from fully exercising the right and responsibility of freely electing our public servants." Letter from Herbert E. Hoffman, Director, ABA Governmental Relations

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[4] Because legislation reauthorizing the VRA was introduced in the United States House of Representatives on May 2, 2006 and in the Senate on May 3, 2006, but the ABA HOD did not meet until August 2006, this Report with Recommendation was adopted as ABA policy in June 2006 by the ABA's Board of Governors, acting pursuant to ABA by-laws, to permit the ABA to participate in the congressional debate.

[5] 42 U.S.C. § 1973c.

Office, to Hon. Peter W. Rodino, House Judiciary Chairman 2 (Oct. 5, 1981) (available from the ABA).

Twenty-five years later, the ABA repeated that same call when Section 5 came up for renewal once again. In 2005, the ABA House of Delegates resolved to support the 25-year extension of Section 5 that is now before the Court. The accompanying Report stated that "despite the progress that has been made since the passage of the Act, members of minority groups still face discrimination in exercising their right to vote." *ABA 2005 Report with Recommendation #108*, Report at 1. As discussed below, this finding tracks the evidence that was before Congress when it decided to renew Section 5.

The ABA reaffirmed its policy and conclusions in 2006, finding that Section 5 is one of the Act's "most important and effective" provisions; that it, along with its companion provisions, "will continue to be important factors and safeguards in making available the right to vote to all segments of our population"; and that it therefore "must be reauthorized." *ABA 2006 Report with Recommendation*, Report at 1, 4.

The ABA made its support for reauthorization clear to Congress as both houses were debating the legislation now on review before this Court. In a letter sent to all members of the House of Representatives, the ABA stated that "[t]he Voting Rights Act has been critical to the expansion of our democratic franchise to all eligible citizens" and that "reauthorization would allow progress to continue through enhanced access to the political process by all citizens, as well as by signaling a clear repudiation of discriminatory voting practices." Letter from Robert

D. Evans, Director, ABA Governmental Affairs Office, to House of Representatives 1-2 (June 20, 2006).[6] In a letter to all members of the Senate, the ABA likewise explained that "[b]ecause of the persistence of discriminatory behavior in the election process," Section 5 and the rest of the Act "remain[ ] an essential tool in the struggle to preserve and protect voting rights for all Americans." Letter from Robert D. Evans, Director, ABA Governmental Affairs Office, to Senate 2 (July 20, 2006) ("ABA July 2006 Senate Letter").[7]

The ABA's views have not changed. The ABA firmly believes—and the evidence bears out—that difficult-to-remedy unconstitutional discrimination persists in the election process and that Section 5's work accordingly is not complete. Without Section 5, the dedicated lawyers who seek to vindicate voting rights in this Nation would face an even more difficult time when challenging discriminatory practices. The Act, in short, continues to "provide critical protections" against discrimination in voting. Letter from Robert D. Evans, Director, ABA Governmental Affairs Office, to House of Representatives 1 (July 12, 2006) ("ABA July 2006 House Letter"). The decision of the District Court should be affirmed.

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[6] *Available at* http://www.abanet.org/poladv/letters/electionlaw/060620letter_vra_reauth_house.pdf.

[7] *Available at* http://www.abanet.org/poladv/letters/electionlaw/060720letter_vra_reauth_senate.pdf.

SUMMARY OF ARGUMENT

I. Appellant Northwest Austin Municipal Utility District Number One ("the Utility District") is incorrect in asserting that "[t]he record Congress amassed in 2006 * * * is not of the quality to demonstrate that § 5 remains a valid exercise of Congress's enforcement powers." App. Br. 2. The congressional record that supported Section 5's renewal is replete with evidence, both statistical and in the form of first-hand accounts, demonstrating the necessary predicates for Section 5—namely, that unconstitutional voting discrimination continues in the covered jurisdictions and that Section 5 is an effective tool to combat it. The legislative record is far more robust than the Utility District admits and is more than sufficient, under this Court's precedents, to justify Section 5's reauthorization.

II. The Utility District is also incorrect in its assertion that Section 5 is no longer a "congruent and proportional" remedy under *Boerne*—an assertion it bases in large part on the claim that Section 2 offers sufficient tools to attack the sorts of discrimination extant in covered jurisdictions. First, the argument wrongly assumes that *Boerne* somehow displaces the standard of review this Court has employed in repeatedly affirming Section 5's constitutionality. *See* NAACP Br. 23-26. Second, it contradicts Congress' factual findings as to Section 2. But even setting aside these problems, the argument fails because contrary to the Utility District's implicit suggestion, *Boerne* does not create a least-restrictive-means requirement. Instead, it guards against legislative attempts to expand constitutional rights by ensuring that Congress's prophylactic legislation (i) actually

targets demonstrable, unconstitutional state action and (ii) does not invalidate such a broad swath of state and local actions that it can no longer "be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 531-532. Section 5 meets both criteria. To the extent *Boerne* applies to this case, it compels affirmance.

ARGUMENT

I. THE RECORD JUSTIFIES REAUTHORIZATION.

The Utility District's Section 5 argument relies on the premise that contemporary discrimination "of the type that justified § 5 is rare, if it exists at all, and cannot justify renewing § 5 for yet another generation." App. Br. 27. The record before Congress in 2006, however, was replete with evidence that precisely the type of behavior that justifies Section 5—unconstitutional voting discrimination—persists across the covered jurisdictions and would be even more prevalent in Section 5's absence. The robust legislative record is more than sufficient, under this Court's precedents, to justify Section 5's reauthorization.

1. The Utility District can argue that evidence supporting Section 5's reauthorization "is rare, if it exists at all," App. Br. 27, only by asserting that there must be a showing of "a systematic pattern of covered jurisdictions recently engaging in concerted efforts to game the system to the disadvantage of minorities by acting preemptively to impose new barriers to voting once old barriers are judicially deemed unenforceable." App. Br. 40-41.

As an initial matter, the record before Congress contained just such a showing: It included extensive evidence that particular jurisdictions have received multiple Section 5 objections, and in some cases have faced a combination of Section 5 objections and Section 2 lawsuits, since 1982. *See* Br. of Louis Intervenors 15-19, 47-51. But in any event, the Utility District's narrow understanding of Section 5 is not correct. As the Government has pointed out: "Although this Court recognized in *Katzenbach* that 'some' covered States had engaged in such [gamesmanship], the Court repeatedly stated that it was the cumbersome nature of case-by-case adjudication of voting cases" that prompted Congress to adopt the preclearance mechanism and that gamesmanship was "only one aspect of the larger failure of traditional legislative bans on discrimination in voting." U.S. Mot. to Affirm 18-19 (quoting and citing *South Carolina* v. *Katzenbach*, 383 U.S. 301, 313-314, 327-328, 335 (1966)) (internal citations omitted). *See also Boerne*, 521 U.S. at 526 (explaining that the VRA's "new, unprecedented remedies," including Section 5, "were deemed necessary given the ineffectiveness of the existing voting rights laws and the slow, costly character of case-by-case litigation") (citing *Katzenbach*, 383 U.S. at 313-315, 328).

The validity of Section 5's reenactment thus does not hinge on Congress being able to point to a "systematic pattern of covered jurisdictions * * * gam[ing] the system to the disadvantage of minorities." App. Br 40. Instead, Congress has "wide latitude" in determining "measures that remedy or prevent unconstitutional actions." *Boerne*, 521 U.S. at 519. *Compare id.* at 528 (stating that the "rationales" for upholding Section 4(e) of the VRA "rested on

unconstitutional discrimination * * * and Congress' reasonable attempt to combat it"). The record compiled by Congress is replete with evidence both that "unconstitutional actions" persist and that Section 5 is an important tool to "remedy or prevent" them.

a. *Intentional Discrimination.* Congress explicitly found, in re-enacting Section 5, that hundreds of voting-rule changes sought by covered jurisdictions between 1982 and 2006 "were calculated decisions to keep minority voters from fully participating in the political process." Those calculated and intentional decisions—had the Attorney General not interceded under the authority of the VRA—would have unconstitutionally deprived citizens of their right to vote. H.R. Rep. No. 109-478 at 21 (2006) ("*2006 House Report*"); *see also* ABA July 2006 Senate Letter ("Because of the persistence of discriminatory behavior in the election process, the Act remains an essential tool in the struggle to preserve and protect voting rights for all Americans."); *Bartlett* v. *Strickland*, --- S. Ct. ---, 2009 WL 578634, at *16 (U.S. Mar. 9, 2009) (op. of Kennedy, J.) (observing that "racial discrimination and racially polarized voting are not ancient history" and that "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions"). Congress's finding on this score is amply supported by the record it amassed:

- In 2005, the Department of Justice "blocked a redistricting plan in the Town of Delhi, Louisiana, after finding it was motivated by intent to retrogress [and] would have eliminated an African-American opportunity district." *Reauthorizing the Voting Rights Act's Temporary Provi-*

sions: Hearing on S. 2703 Before Subcomm. on Constitution, Civil Rights and Property Rights of S. Comm. on Judiciary, 109th Cong. 45 (2006) ("*Senate Hearing*") (Response of Debo P. Adegbile).

- In 2003, the Department of Justice blocked a proposed municipal annexation in the Town of North, South Carolina, finding that the town intentionally made a habit of allowing white petitioners to annex their property to the town—and thus increase the white voting base—while "largely ignor[ing]" the requests of black residents to do the same. *Senate Hearing* at 60 (Response of Debo P. Adegbile) (citing Letter From R. Alexander Acosta, Assistant Attorney General, Department of Justice, to Mayor H. Bruce Buckheister (Sept. 16, 2003)).

- Following the 2000 census, the Department of Justice blocked the City of Albany, Georgia's redistricting plan, finding that the plan intentionally split what should have been a majority-black ward. The Department's letter of objection concluded it was "implicit" that "the proposed plan was designed with the purpose to limit and retrogress the increased black voting strength in Ward 4, as well as in the city as a whole." Laughlin McDonald, *The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union* 5 (Mar. 2006) ("*McDonald Report*") (quoting Letter From J. Michael Wiggins, Acting Assistant Attorney General, De-

partment of Justice, to Al Grieshaber Jr. (Sept. 23, 2002)) (quotation marks omitted).[8]

- In 1999, officials in Dinwiddie County, Virginia moved a polling place from a hunt club with a large black membership to a church located as far as possible from the precinct's black population center. The Department of Justice objected to the change, finding that the polling place was moved for discriminatory reasons. 152 Cong. Rec. S7748 (July 18, 2006) (statement of Sen. Leahy) (citing Letter From Bill Lann Lee, Acting Assistant Attorney General, Department of Justice, to Benjamin W. Emerson (Oct. 27, 1999)).

- In 1992, white officials in black-majority Hale County, Alabama physically held polling-place doors closed to prevent black voters from entering the precinct to cast votes. A black legislator who managed to pull one of the doors open to let voters in was arrested. *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005*, Nat'l Comm'n on the Voting Rights Act 62-63 (Feb. 2006) ("*NCVRA Report*").

- In 1991, the Police Jury in Concordia Parish, Louisiana announced that it would reduce its size from nine members to seven, thereby eliminating a black-majority district. The Department of Justice rejected the change, finding the locality's cost-saving justification pretextual and

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[8] The *McDonald Report* and the other reports cited in this section were submitted into the record during the congressional hearings on Section 5's re-enactment. *See 2006 House Report* at 21 n.48; *id.* at 38 n.82.

noting that the parish had seen no need to save money until an influx of black residents "flipped" the district in question from majority-white to majority-black. *2006 House Report* at 23 (citing Letter From John R. Dunne, Assistant Attorney General, Department of Justice, to Secretary-Treasurer Robbie Shirley (Dec. 23, 1991)).

- In 1990, the City of Monroe, Louisiana attempted to annex white suburban wards to its city court jurisdiction. The Department of Justice objected, noting that the wards in question had been eligible for annexation since 1970 but that there had been no interest in annexing them until just after the first-ever black candidate ran for city court. *2006 House Report* at 23 (citing Letter From John R. Dunne, Assistant Attorney General, Department of Justice, to Cynthia Young Rougeou, Assistant Attorney General, State of Louisiana (Oct. 23, 1990)).

- In 1988, the Department of Justice rejected a Lumber City, Georgia ordinance that contained certain majority-vote and numbered-post requirements for city elections. The Department found that the requirements had blocked the election of a black candidate and that they were "tainted, at least in part, by a proscribed purpose." *McDonald Report* at 434-435 (quoting Letter From William Bradford Reynolds, Assistant Attorney General, Department of Justice, to Ken W. Smith (July 8, 1988)) (quotation marks omitted).

These are far from the only examples of post-1982 intentional discrimination in the record before Con-

gress. On the contrary, as the Government has noted, "[b]etween 1980 and 2000, the Attorney General interposed 421 objections based wholly or partially on discriminatory intent." U.S. Mot. to Affirm 21 (citing J.S. App. 76-77). *Compare Boerne*, 521 U.S. at 530 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.").

Furthermore, the witnesses who appeared before Congress testified that intentional discrimination is still a disturbingly widespread and frequent occurrence—a finding Congress adopted, as it was entitled to do. *See 2006 House Report* at 21. Debo P. Adegbile, Associate Director of Litigation for the NAACP Legal Defense and Educational Fund, Inc., testified that "the congressional record is replete with examples of continuing voting discrimination against racial minorities in the covered jurisdictions" and that a "surprisingly significant" number of the post-1982 objection letters issued by the Department of Justice involve findings of intentional discrimination. *Senate Hearing* at 52, 73. As to Louisiana specifically, Adegbile testified that "[s]ignificant * * * voting changes adopted with retrogressive purpose" continue to be "commonplace." *Id.* at 130. Likewise, the National Commission on the Voting Rights Act ("NCVRA") concluded that "efforts to suppress the minority vote, while not as systematic and pervasive as those of the pre-Act South, are still encountered in every election cycle across the country." *NCVRA Report* at 7.

The record also suggests that the numerical tally of intentional-discrimination objection letters and court findings understates the actual prevalence of uncon-

stitutional discrimination. As appellees have pointed out, since 1982, the Attorney General and the D.C. District Court have interposed more than 750 Section 5 objections to more than 2,400 proposed voting changes based on findings that those changes were discriminatory; an additional 1,100 changes have been abandoned or modified in response to more-information-request letters; and plaintiffs in covered states have been successful in more than 650 lawsuits under Section 2 of the Act, 42 U.S.C. § 1973a. U.S. Mot. to Affirm 15-16.

The Utility District apparently would disregard this evidence as insufficiently reflective of intentional discrimination. *E.g.*, App. Br. 53. However, as to requests for more information, the evidence demonstrated, and Congress affirmatively found, that a locality's withdrawal of a proposed change often signals that the locality had an improper motive in the first place. *2006 House Report* at 40-41. Furthermore, there was record evidence suggesting that many of the cases that resulted in discriminatory-effect findings from the Department of Justice and the courts may also have involved discriminatory intent. As Professor Karlan explained in testimony before the Senate: "One consequence of the 1982 amendment of section 2 is that plaintiffs are rarely called upon to prove, and courts are rarely called upon to find, that a defendant jurisdiction has engaged in purposeful racial discrimination that would violate the Constitution as well. This is not to say that such purposeful discrimination does not exist." *Senate Hearing* at 173 (testimony of Prof. Pamela S. Karlan).

b. *Efficacy of Section 5.* Congress likewise compiled extensive record evidence demonstrating that Section 5 is an effective—and irreplaceable—tool to remedy and prevent persistent unconstitutional voting discrimination. In addition to the pure numbers of objection letters and withdrawn proposals recounted above, the evidence demonstrated that "the deterrent effect of Section 5 is substantial." *NCVRA Report* at 57; *see also 2006 House Report* at 24 (adopting NCVRA finding). After holding 10 hearings across the nation and hearing from 100 witnesses, the NCVRA recounted evidence that "[o]nce officials in covered jurisdictions become aware of the logic of preclearance, they tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result." *NCVRA Report at 57*; *accord Senate Hearing* at 169-170 (testimony of Prof. Karlan) (concluding that Section 5 performs a deterrent function and that the deterrent function is "especially important with respect to changes at the local level").

The evidence also demonstrated that Section 5's deterrent effect continues to play a "critical role in minority citizens' political integration" because "the political gains minority citizens have achieved since the passage of the Act are sufficiently recent and the incentives for officials to ignore the interests of minority voters are sufficiently attractive that backsliding would occur in the absence of the Act's substantive and procedural protections." *Senate Hearing* at 168-169 (testimony of Prof. Karlan); *see also* ABA July 2006 House Letter 2 (stating that the Act's "special remedial provisions have enabled the federal

government to enforce the prohibition on discriminatory voting practices and mechanisms. These provisions have been very effective at enhancing the democratic principles that form the foundation of our nation.").

Nor was the evidence before Congress supportive of the Utility District's assertion that Section 5 is no longer necessary because "[t]he voting-rights problems Congress identified in the 2006 record * * * are quickly and fully remedied by § 2 and other substantive prohibitions." App. Br. 27. To the contrary, the record demonstrated that private lawsuits are often cumbersome and unable to prevent the more pervasive forms of second-generation voting discrimination: last-minute attempts to move polling booths, eleventh-hour attempts to delay elections, and the like. As the General Counsel of the North Carolina State Board of Elections testified: "Section 2 cases are complex and can take several years to fully litigate at the trial level, exclusive of any appeals. In the meantime, the discriminatory voting change is put into effect, which would not happen under Section 5." *Senate Hearing* at 121 (testimony of General Counsel Don Wright). Wright explained that even if the Section 2 litigation is ultimately successful, "the damage is often already done: elections may have been held under an unlawful plan, providing candidates elected under that plan an advantage in terms of incumbency and fundraising under any remedial plan that might be adopted." *Id.*; *see also* Br. of Louis Intervenors 10-11 (cataloguing additional evidence).

2. Rather than address the entirety of the record before Congress, the Utility District focuses on the

evidence of gamesmanship. App. Br. 43-54. But that approach ignores the broader purpose of Section 5 that this Court acknowledged in *Katzenbach*. *See* 383 U.S. at 314, 327-328 (discussing limitations of case-by-case litigation). And to the extent the Utility District contests the evidence before Congress—arguing, for instance, that Section 2 is up to the task currently performed by Section 5—its argument would require this Court to ignore the extensive record from which Congress concluded that Section 5 is essential for both confronting and deterring a myriad of unconstitutional voting discrimination attempts. In short, the Utility District forgets that this Court "owe[s] Congress' findings deference in part because the institution 'is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon' legislative questions." *Turner Broad. Sys. Inc.* v. *FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*") (quoting *Turner Broad. Sys. Inc.* v. *FCC*, 512 U.S. 622, 665-666 (1994) ("*Turner I*")).

II. THE UTILITY DISTRICT OVERREADS *BOERNE* AND IGNORES THE LIMITED NATURE OF THE SECTION 5 REMEDY.

The Utility District bases its argument for Section 5's unconstitutionality on *Boerne*'s "congruence and proportionality" test, but the argument is not supported by either *Boerne*'s holding or its animating logic.

1. The Utility District contends, in effect, that (i) *Boerne* imposes on Congress a strict scrutiny-style least-restrictive-means requirement and (ii) Section 5 does not meet this standard because, among other things, Section 2 suffices to address the voting-discrimination problems identified in the record.

See, e.g., App. Br. 36-37. Besides being counter to the evidence presented to Congress, *see supra* at 16—and besides incorrectly assuming that *Boerne* somehow altered the deferential framework for Section 5 review that this Court has employed for decades[9]—this argument attributes to *Boerne* a test that the case did not announce. Indeed, the argument entirely disregards *Boerne*'s recognition that Congress has the power to " 'prohibit changes that have a discriminatory impact' " as a way to reach demonstrable intentional discrimination—a power that cannot be reconciled with a least-restrictive-means requirement. 521 U.S. at 532 (quoting *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980)); *accord Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (reaffirming Congress' power under Section 5 of the Fourteenth Amendment to enforce a constitutional right by "prohibiting a somewhat broader swath of conduct" than is forbidden by the Constitution).

The *Boerne* test is, instead, a mechanism to ensure that remedial legislation does not "become substantive in operation and effect" by decreeing a different or more fulsome right than the one guaranteed by the Constitution. 521 U.S. at 519-520. To that end, the *Boerne* Court struck down the Religious Freedom Restoration Act ("RFRA") because the statute expressly targeted a type of state action not forbidden by the Fourteenth Amendment, and it did so based on a legislative record devoid of evidence of unconsti-

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[9] *See* NAACP Br. 23-26; *see also Lopez* v. *Monterey County*, 525 U.S. 266, 283 (1999); *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980); *Katzenbach*, 383 U.S. at 326.

tutional state action in need of a remedy. *Id.* at 530-532.

2. This case simply does not trigger the concerns that animated *Boerne*. Congress found in reauthorizing Section 5 of the VRA that localities continue to enact unconstitutional—not just undesirable—voting rules. *See supra* at 9-14. Furthermore, Congress found that Section 5 has been used to block hundreds of voting laws and rules that were motivated by racial discrimination. J.S. App. 77. A claim that Section 5 does not target unconstitutional behavior, *see* App. Br. 42-56, disregards the substantial record compiled by Congress. As this Court has held, "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process." *Turner II*, 520 U.S. at 199; *see id.* at 195 (court's sole obligation in reviewing constitutionality of a statute is " 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence,' " with substantiality measured "by a standard more deferential than we accord to judgments of an administrative agency") (quoting *Turner I*, 512 U.S. at 665-666).

3. Nor can the impact of Section 5's preclearance requirement be fairly compared to the statute struck down in *Boerne*. Indeed, *Boerne* itself contrasted the VRA (including Section 5) with RFRA and held up the former as a model of congruent, proportional legislation. *See* 521 U.S. at 526. *Boerne* highlighted the VRA's focus on a single class of state laws, its expiration date, and its geographical restrictions; all were features absent from RFRA. *See id.* at 525-526.

An additional and important difference between RFRA and Section 5 of the VRA must be noted:

Section 5 does not strike down the vast majority of laws within its scope; it instead merely delays their enactment for a period of weeks, giving the Attorney General time to identify those few that raise concerns of discrimination. *See* 42 U.S.C. § 1973c(a) (creating 60-day review period). It is inaccurate, in other words, for the Utility District to assert that Section 5 "preempts every change related to voting * * * in covered jurisdictions." App. Br. 38 (emphasis deleted). Section 5 *affects* every change related to voting; it *preempts* a small proportion of those proposed. This is a crucial distinction from *Boerne*, which addressed itself to a statute that "*displac[ed]* laws and *prohibit[ed]* official actions of almost every description." 521 U.S. at 532 (emphases added).

Boerne, in short, was a case about the categorical prohibition of constitutional behavior; this is a case about contingent delay aimed at preventing unconstitutional behavior. To the extent it applies here, *Boerne* compels affirmance.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-322

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,
Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET. AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, ASIAN AMERICAN INSTITUTE, ASIAN LAW CAUCUS, ET AL. IN SUPPORT OF APPELLEES

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Asian Law Alliance (ALA)

Asian Pacific American Labor Alliance, AFL-CIO (APALA)

Asian Pacific American Legal Resource Center (APALRC)

Asian & Pacific Islander American Health Forum (APIAHF)

Asian & Pacific Islander American Vote (APIAVote)

Boat People SOS, Inc. (BPSOS)

Chinese for Affirmative Action (CAA)

Fred T. Korematsu Center for Law and Equality (Korematsu Center)

Hmong National Development, Inc. (HND)

Japanese American Citizens League (JACL)

National Asian Pacific American Bar Association (NAPABA)

National Korean American Service & Educational Consortium (NAKASEC)

National Asian Pacific American Women's Forum (NAPAWF)

Organization of Chinese Americans, Inc. (OCA)

Sikh American Legal Defense and Education Fund (SALDEF)

Southeast Asian Resource Action Center (SEARAC)

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STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

The Asian American Justice Center ("AAJC"), a 501(c)(3) nonprofit, nonpartisan organization, was incorporated in 1991 and opened its Washington, D.C., office in 1993. AAJC works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. In accomplishing its mission, AAJC works to promote civic engagement, to forge strong and safe communities, and to create an inclusive society in communities on a local, regional, and national level. A nationally recognized voice on behalf of Asian Americans, AAJC focuses its expertise on voting rights, anti-Asian violence prevention/race relations, census issues, immigrant rights, language access, and affirmative action. AAJC has maintained a strong interest in the voting rights of Asian Americans and strives to protect Asian Americans' access to the polls. Such long-standing interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

Amici include some of the largest and oldest Asian American groups in this country. These organizations are involved in challenging racial discrimination, safeguarding civil rights, and protecting the voting rights of Asian Americans. Statements of interest for additional *Amici* are included in Appendix A.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Appellant asks the Court to declare Section 5 of the Voting Rights Act unconstitutional. As other briefs have shown, Section 5 and its reauthorization are a valid exercise of Congressional power under the Fourteenth and Fifteenth Amendments. The purpose of this brief is to highlight continuing disparities faced by Asian American populations in Section 5-covered jurisdictions with respect to voter registration and turnout, electoral representation, and racial discrimination in voting, thereby demonstrating that Section 5 is essential to ensuring access to the polls by Asian Americans, particularly as Asian American populations continue to rapidly grow in Section 5-covered jurisdictions.

ARGUMENT

As the Court has recognized, this country's long history of racial discrimination in voting continues in the present day, and the effects of this discrimination still pervade our system of democracy. *See Bartlett v. Strickland*, __ U.S. __, No. 07-689, 2009 U.S. LEXIS 1842, *42 (Mar. 9, 2009) ("racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions. . . ."). In response to this history of discrimination against racial minorities, Congress passed the Voting Rights Act, together with other important civil rights legislation, in 1965. Section 5 of the Voting Rights Act serves an important tool in vindicating the voting rights of racial minorities. Section 5 has been extended four times by Congress, in 1970, 1975, 1982, and 2006. In approving the most recent extension of Section 5, Congress heard testimony from numerous

organizations and individuals on the important role that the Voting Rights Act has played in deterring civil rights violations and ensuring equal access to voting.

AAJC and other *Amici* supported the 2006 reauthorization of Section 5 and the other temporary provisions of the Voting Rights Act because it recognized the importance of the Voting Rights Act in ensuring equal access to voting for Asian Americans. Although Asian Americans are at times overlooked when examining our country's history of racial discrimination, the lingering effects of racial discrimination against Asian Americans remain today.[2] The Voting

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[2] Asian Americans are often portrayed as the "model minority," with the assumption that they have succeeded in achieving economic prosperity and assimilating into American society. This myth ignores the diversity within the Asian American community, as well as the long history of discrimination against Asian Americans that unfortunately continues today. *See, e.g.*, Frank H. Wu, *Yellow: Race in America Beyond Black and White*, 39-59 (Basic Books 2002) (discussing the empirical and other flaws in this myth); Deborah Woo, *Glass Ceilings and Asian Americans: The New Face of Workplace Barriers*, 34-38 (Altamira Press 2000). Contrary to the model minority myth, Asian Americans' socioeconomic status reflects the lingering effects of racial discrimination, as eleven Asian American groups have poverty rates above average, including Chinese, Koreans, Vietnamese, and Pakistanis. *See* Asian American Justice Center, *A Community of Contrasts: Asian Americans and Pacific Islanders in the United States* 2 (2006) [hereinafter *Community of Contrasts*]. Asian Americans experience "glass ceiling" barriers in the corporate sector, the federal government, science and engineering, academia, the federal judiciary and discrimination in government contracting. *See Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing on S. 2703 Before Subcomm. On the Constitution, Civil Rights and Prop. Rights of the Comm. on the Judiciary*, 109th Cong. 9-10 (June 13, 2006) (statement of Karen K. Narasaki, Pres. and

Rights Act helps to remedy continued discrimination and its provisions, including Section 5, are targeted toward the areas with the most need. As Asian American voters continue to encounter discrimination at the polls and as the Asian American population grows in jurisdictions covered by Section 5, Section 5 will become even more crucial to ensuring meaningful and fair representation for Asian Americans.

I. ASIAN AMERICAN VOTERS IN SECTION 5 JURISDICTIONS CONTINUE TO ENCOUNTER DISCRIMINATION AND SUFFER FROM DISPARITIES IN VOTING PARTICIPATION AND ELECTORAL REPRESENTATION.

In *City of Rome v. United States*, the Court upheld the constitutionality of Section 5 of the Voting Rights Act and reaffirmed its decision in *South Carolina v. Katzenbach* that Congress may outlaw voting practices that are discriminatory in effect. 446 U.S. 156, 175 (1980) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966)). The Court recognized that Congress, in considering the extension of the Voting Rights Act in 1975, determined that, though voter registration among African Americans had improved since the initial passage of the Voting Rights Act in 1965, significant disparities existed between the percentages of registered whites and African Americans to vote, and recognized the dearth of African Ameri-

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Exec. Dir., Asian Am. Justice Ctr.) [hereinafter *Narusaki Statement*], *available at* http://www.advancingequality.org/files/VRA_Senate_Hearing_Statement_706.pdf. Asian Americans also face barriers to voting, in part because of high levels of limited English proficiency.

can elected officials, particularly in state office. *See id.* at 180-81.

A. Asian American Populations In Section 5 Jurisdictions Suffer From Disparities In Voter Registration and Turnout.

Though it has been almost thirty years since the Court's decision in *City of Rome*, disparities in voting and political representation still exist. Asian Americans in particular continue to suffer from disparities in voter registration and turnout as compared to non-Hispanic white Americans. The U.S. Census Bureau reported that in November 2006, 49.1% of eligible Asian Americans were registered to vote, as opposed to 71.2% of eligible non-Hispanic white Americans nationwide. *See* U.S. Bureau of the Census, *Reported Voting and Registration of the Citizen Voting-Age Population, for States: November 2006*, Table 4b (Nov. 2006) [hereinafter 2006 Table 4b], *available at* http://www.census.gov/population/www/socdemo/votive/cps2006.html. Likewise, only 32.4% of eligible Asian Americans voted, as opposed to 51.6% of eligible non-Hispanic white Americans.[3] *See id.*

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[3] The Census Bureau reported that the percentage of Asian American citizens who were registered and voted decreased slightly between 1994 and 2002 as the Asian American citizen population became larger. *See* U.S. Bureau of the Census, *Voting and Registration in the Election of November 2002: Population Characteristics* 5 (July 2004), *available at* http://www.census.gov/prod/2004pubs/p20-552.pdf. The percentage of Asian American citizens registered were 51.9, 49.1, and 49.2 in 1994, 1998, and 2002, respectively. The percentage of Asian American citizens who voted were 39.4, 32.3, and 31.2 in 1994, 1998, and 2002, respectively. *Id.*

The voting rates for Asian Americans also tend to be lower in the South (a low of 24.7%), where many covered jurisdictions are located, including Georgia, Texas and Virginia. *See* U.S. Bureau of the Census, *Voting and Registration in the Election of November 2006: Population Characteristics* 8 (June 2008), *available at* http://www.census.gov/prod/2008pubs/p20-557.pdf. For example, in Georgia, which has a population of 102,000 Asian American citizens, only 30.4% of those citizens were registered to vote in November 2006; 25.7% actually voted. *See* 2006 Table 4b, *supra*. This is in stark contrast to the percentage of non-Hispanic white citizens in Georgia who were registered (68.8%) and who voted (46.9%). *See id.*[4] In the 2008 general election, only 58% of Georgia's Asian American registered voters turned out to vote compared to 77% of white registered voters. *See* Ga. Sec'y of State Voter Registration Sys., *Active Voters by Race/Gender, General Election Voting History* (Jan. 22, 2009), *available at* http://sos.georgia.gov/elections/voter_registration/2008%20stats/DocumentDirect%20SSVRZ376_Nov_2008.pdf.

B. Asian Americans in Section 5 Jurisdictions Also Lack Electoral Representation.

In addition to these disparities in voter registration and turnout, Asian Americans continue to lack repre-

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[4] Similarly, in Texas, home to 319,000 Asian American citizens, only 43.0% were registered in November 2006 with 24.1% actually voting. *See* 2006 Table 4b, *supra*. By contrast, 72.8% of non-Hispanic white citizens in Texas were registered with 45.2% voting. *See id.* In Virginia, home to 140,000 Asian American citizens, only 48.4% were registered in November 2006 with 25.2% actually voting. *See id.* By contrast, 71.1% of non-Hispanic white citizens in Virginia were registered with 51.9% voting. *See id.*

sentation in elected offices nationwide. This is particularly true in jurisdictions covered by Section 5. In the nine states that are wholly covered by Section 5 (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia), only five Asian Americans held state office in 2007. *See National Asian Pacific American Political Almanac* 82 (Don T. Nakanishi and James S. Lai, eds. 2007-08). Only eight Asian Americans held city council or mayoral positions. *See id.* Twenty-five Asian Americans were elected to judgeships and seven others were elected to school board or other positions. *Id.* at 83. These numbers are minute considering that the Asian American population ranges from 3% to almost 6% in five of these states (Alaska, Arizona, Georgia, Texas, and Virginia). *See* U.S. Bureau of the Census, *Annual State Population Estimates with Sex, 5 Race Groups* (5 Race Alone or in Combination Groups) and Hispanic Origin: April 1, 2000 to July 1, 2007, (May 1, 2008) [hereinafter 2007 State Population Estimates], *available at* http://www.census.gov/popest/states/asrh/files/SC-EST2007-5RACE-ALL.csv.

These numbers are sparse compared to the growing Asian American populations in these jurisdictions. For example, 915,201 Asian Americans resided in Texas in 2007, a 40.35% increase since 2000. *See id.* Asian Americans consist of 3.83% of the population in Texas. *See id.* Currently, only one Asian American serves in the Texas state legislature, which includes 181 members. *See* Nakanishi, *supra*, at 82. Virginia presents a similar situation, with one Asian American member of Congress, no Asian American representatives in the 140-member Virginia legislature, no Asian American city council members, and only two Asian American school and college board members. This is the case even though Virginia's population is

5.49% Asian American, and Asian Americans make up over 6% of the population in ten counties and independent cities in Virginia and over 10% of the population in four counties and independent cities. *See id.* at 82-83; U.S. Bureau of the Census, *Annual Population Estimates, Estimated Components of Population Change, and Rates of the Components of Population Change for Counties: April 1, 2000 to July 1, 2007* (March 20, 2008) [hereinafter 2007 County Population Changes], *available at* http://www.census.gov/popest/counties/files/CO-EST2007-ALLDATA.csv; U.S. Bureau of the Census, *Annual County Resident Population Estimates by Age, Sex, Race, and Hispanic Origin: April 1, 2000 to July 1, 2007 (Virginia)* (August 7, 2008), *available at* http://www.census.gov/popest/counties/asrh/files/cc-est2007-5race-51.csv. Similarly, in Georgia, there were no Asian American members of Congress and only one Asian American representative in the 236-member Georgia state legislature, one Asian American city council member, and one Asian American school and college board member. This is the case, even though Georgia's population is 3.19% Asian American, and Asian Americans make up 4% or more of the population in eight counties in Georgia. See Nakanishi, *supra*, at 82-83; 2007 County Population Changes, *supra*; U.S. Bureau of the Census, *Annual County Resident Population Estimates by Age, Sex, Race, and Hispanic Origin: April 1, 2000 to July 1, 2007 (Georgia)* (May 1, 2008), *available at* http://www.census.gov/popest/counties/asrh/files/cc-est2007-5race-13.csv.

C. Asian American Voters in Section 5 Jurisdictions Still Suffer From Discrimination.

Discrimination against Asian American voters continues to afflict Section 5-covered jurisdictions.[5] The importance of continuing Section 5 coverage was recently underscored by discriminatory voting changes made by the State of Georgia that affected the rights of thousands of minority voters. In March 2007, Georgia implemented a citizenship confirmation system to cross-check information provided on voter registration forms against lists maintained by the Georgia Department of Driver Services ("DDS") and the federal Social Security Administration to verify citizenship. *See* Jonathan Springston, *Federal Court Intervenes in Handel's Voter Purge*, The Atlanta Progressive News (Oct. 31, 2008), *available at* http://

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[5] Indeed problems have persisted as recently as the November 2008 elections. In November 2008, the Asian American Legal Defense and Education Fund received hundreds of complaints from Asian American voters on its telephone hotline, which included Section 5 covered jurisdictions New York (partially covered), Louisiana, Texas, and Virginia. *See Asian American Voter Turnout High on Election Day, but Many Face Problems at Polls*, USAsian Wire (Nov. 5, 2008), *available at* http://www.usasianwire.com/release.php?id=1919922208. Voters in these jurisdictions experienced difficulties because of poll workers' non-compliance with language assistance obligations, names of registered voters being dropped from voter lists, and improper electioneering by poll workers. See *id* In Annandale, Virginia, volunteer monitors reported that campaign operatives told Korean voters how to vote and who to vote for. In Falls Church, Virginia, a poll worker ignored Asian American voters while assisting white voters who stood behind them. *See* Glenn Magpantay, *Attorneys Monitor Polls on Election Day 2008*, National Asian Pacific American Bar Association Lawyer (Winter 2009), at 6.

www.atlantaprogressivenews.com/news/0395.html. The verification system contained several flaws, including reliance upon outdated information contained in the DDS database, which is not updated to reflect citizenship status for persons who become naturalized after receiving a driver's license.

The Mexican American Legal Defense and Educational Fund ("MALDEF") and several other voting rights groups brought a lawsuit against the State of Georgia on behalf of a naturalized citizen who was issued a letter informing him that he may not be eligible to vote. *See* Complaint, *Morales v. Handel*, No. 1:08cv3172 (N.D. Ga. Oct. 9, 2008). Among other things, the lawsuit alleged non-compliance with Section 5's preclearance requirement.[6] As a result of the lawsuit, a three-judge panel of the U.S. District Court for the Northern District of Georgia held that Georgia's failure to submit its new verification system for preclearance was a violation of Section 5. *See* Order, *Morales v. Handel*, No. 1:08cv3172 (N.D. Ga. Oct. 27, 2008).[7] The court also issued a temporary injunction

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[6] Though Georgia is a covered jurisdiction under Section 5, it failed to submit its new verification system to the Department of Justice for preclearance. *See* Letter from Christopher Coates, Chief, Voting Section, U.S. Dep't of Justice, to Thurbert E. Baker, Attorney Gen. of Ga. (Oct. 8, 2008), *available at* http://www.maldef.org/voting_rights/litigation/Please_Submit_letter_from_DOJ.pdf (requesting that changes to voter registration process be submitted to Department of Justice or U.S. District Court for the District of Columbia pursuant to Section 5).

[7] Unfortunately, the court also required voters and prospective voters who were flagged as non-citizens to vote with a challenge ballot in the November 2008 election and submit proof of citizenship within two days of the election. *See* Order, *Morales v. Handel*, No. 1:08cv3172 (N.D. Ga. Oct. 27, 2008). As a result, ballots of voters who submitted a challenge ballot but did not provide proof of citizenship following the election were

staying the verification system to give the U.S. Department of Justice sixty days to review the system under the Voting Rights Act. *See id.*[8]

The case is a prime example of the continuing need for the preclearance requirement in Section 5 jurisdictions. The Georgia verification system disproportionately hindered minorities from voting by relying on outdated DDS data that failed to reflect citizenship status for recently naturalized citizens — 83% of Georgia residents who became naturalized citizens in the two years prior to the system's implementation were African American, Latino, or Asian American. *See* Letter from the Lawyers' Committee for Civil Rights Under Law, MALDEF, the Voting Rights Project of the American Civil Liberties Union, and Brian Spears to Christopher Coates, Chief, Voting Section, U.S. Dep't of Justice (Nov. 25, 2008) [hereinafter *Joint Letter to Coates*] (on file with the authors), at 9, citing DHS 2007 Yearbook of Immigration Statistics, Supp. Table 1, *available at* http://www.dhs.gov/ximgtn/statistics/publications/YrBk07Na.shtm; DHS Yearbook of Immigration

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thrown out. *See* Mary Lou Pickel, *Nearly 5,000 challenge ballots cast; most accepted*, The Atlanta Journal-Constitution (Nov. 8, 2008), *available at* http://www.ajc.com/services/content/metro/stories/2008/11/08/challenge_ballots_georgia.html?cxtype=rss&cxsvc=7&cxcat=13.

[8] Following the Department of Justice's October 8, 2008 letter to the Georgia Attorney General, Georgia submitted a request for preclearance of the new system. The Department has requested that Georgia provide more information to help determine whether the proposed change is retrogressive. *See* Letter from Christopher Coates, Chief, Voting Section, U.S. Dep't of Justice, to Dennis R. Dunn, Ga. Deputy Attorney Gen. (Dec. 15, 2008), *available at* http://www.aclu.org/pdfs/votingrights/morales_dojrequest_20081215.pdf.

Statistics, Supp. Table 1, *available at* http://www.dhs.gov/ximgtn/statistics/publications/YrBk06Na.shtm.

Not surprisingly, during the year-and-a-half period when Georgia operated the system before the court stayed implementation of the system, the individuals who were "flagged" under the system as non-citizens were also disproportionately minorities, including Asian Americans. Of the 4,596 individuals who were flagged and also identified by race or ethnicity, 20% were Asian American, an incredibly high number considering that less than 4% of Georgia's population is Asian American and only 1% of Georgia's registered voters are Asian American. *See Joint Letter to Coates, supra*, at 9, *citing* U.S. Bureau of the Census, Voting and Registration in the Election of 2006, Table 4b, *available at* www.census.gov/population/wwwsocdemo /voting/cps2006.html.

There has been no evidence that Georgia's verification system resulted in the state identifying any registrants who were not U.S. citizens. *See id.* at 17. Instead, the system created unnecessary barriers to voting for Asian Americans and other minority voters,[9] and highlights the continuing need for Section 5, which is designed specifically to prevent discriminatory practices such as Georgia's verification system from harming minority voters.

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[9] One of these voters, Marvin Lim, who became a naturalized citizen in 2007, underwent many efforts to prove his citizenship to Gwinnett County election officials after being flagged, including repeated phone calls and multiple faxes of his naturalization papers. *See Joint Letter to Coates, supra*, at 13. While Mr. Lim was eventually able to vote (by absentee ballot, which he had to return by express mail), it was only after these unnecessary steps to prove his citizenship. *See id.*

II. AS ASIAN AMERICAN POPULATIONS CONTINUE TO GROW IN SECTION 5 JURISDICTIONS, SECTION 5 COVERAGE REMAINS CRITICAL TO DETERRING DISCRIMINATION AGAINST ASIAN AMERICAN VOTERS.

A. As Asian American Populations Continue To Grow Rapidly In Section 5 Jurisdictions, Levels Of Discrimination Against Racial Minorities Can Be Expected To Increase.

No longer do Asian Americans live in enclaves solely in New York, California, and Hawaii. Significant growth of Asian American populations has taken place in metropolitan areas located in Section 5-covered jurisdictions such as Atlanta, Georgia and Houston, Texas.[10] *See Community of Contrasts, supra*, at 2. New Hampshire, Georgia, Arizona, North Carolina, and Virginia, states that are covered in full or in part by Section 5, were among the top ten states with the fastest rates of growth in the Asian American population between 2000 and 2004. *See id.* at 6; *see also* Haya El Nasser, *In a twist, USA's Asians are heading to the Mountain West*, *USA Today* (Jul. 6, 2008), *available at* http://www.usatoday.com/news/nation/2008-07-06-Asians-West_N.htm (noting the growth of Asian American populations in Nevada, Arizona, Texas, and Washington, D.C.). Georgia and

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[10] The Asian American population has grown between 2000 and 2007 by the following percentages in the following Section 5-covered states: 37.41% in Alabama; 21.11% in Alaska; 60.59% in Arizona; 51.43% in Georgia; 12.57% in Louisiana; 28.06% in Mississippi; 43.70% in South Carolina; 40.35% in Texas; and 38.12% in Virginia. *See* 2007 State Population Estimates, *supra*.

North Carolina more than doubled their Asian American populations between 1990 and 2000.

As Asian American populations continue to increase rapidly in jurisdictions covered by Section 5, levels of racial tension and discrimination against racial minorities can be expected to increase. When groups of minorities, particularly groups of immigrants, move into or outgrow the population in an area, reactions to the influx of outsiders can result in racial tension.[11] Prejudice against Asian Americans persists today, and concerns about discrimination against Asian Americans are legitimate.

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[11] *See* Gillian Gaynair, *Demographic shifts helped fuel anti-immigration policy in Va.*, The Capital (Feb. 26, 2009), *available at* http://www.hometownannapolis.com/news/gov/2009/02/26-10/Demographic-shifts-helped-fuel-anti-immigration-policy-in-Va.html (noting that longtime residents of Prince William County, Virginia, perceived that their quality of life was diminishing as Latinos and other minorities settled in their neighborhoods); James Angelos, *The Great Divide*, N.Y. Times (Feb. 22, 2009) (describing ethnic tensions in Bellerose, Queens, New York, where the South Asian population is growing), *available at* http://www.nytimes.com/2009/02/22/nyregion/thecity/22froz.html?_r=3&pagewanted=1; Ramona E. Romero and Cristóbal Joshua Alex, *Immigrants becoming targets of attacks*, The Philadelphia Inquirer (Jan. 25, 2009) (describing the rise in anti-Latino violence where the immigration debate is heated in New York, Pennsylvania, Texas, and Virginia); Sara Lin, *An ethnic shift is in store; Some Chino Hills residents protest, in vain, an Asian market in the upscale community*, L.A. Times (Apr. 12, 2007), at B1 (describing protest of Chino Hill residents to Asian market opening in their community where 39% of residents were Asian).

B. The Perception of Asian Americans As "Outsiders" That Motivated Past Racial Discrimination Still Persists and Leads To Voting Discrimination Against Asian Americans.

Discrimination against Asian American populations that are rapidly growing in Section 5-covered jurisdictions is of particular concern given the perception of Asian Americans as "outsiders," "aliens," and "foreigners." *See, e.g.*, Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc'y 105, 108-16 (1999) (describing history of whites perceiving Asian Americans as foreign and therefore politically ostracizing them).[12] Based on this perception, at various points in history Asian Americans

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[12] In 2001, a comprehensive survey revealed that 71% of adult respondents held either decisively negative or partially negative attitudes toward Asian Americans. Committee of 100, *American Attitudes Toward Chinese Americans and Asians* 56 (2001), *available at* http://www.committee100.org/publications/survey/C100survey.pdf. Racial representations and stereotyping of Asian Americans, particularly in well-publicized instances where public figures or the mass media express such attitudes, reflect and reinforce an image of Asian Americans as "different," "foreign," and the "enemy," thus stigmatizing Asian Americans, heightening racial tension, and instigating discrimination. C. Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women's L.J. 165, 181 (1995); S. Turnbull, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 Asian Pac. Am. L.J. 72, 74-75 (2001); Terry Yuh-lin Chen, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 Asian L.J. 69, 72, 74-75 (2000); Jerry Kang, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930-32 (1993); T. Devos & M. Banaji, *American = White?*, 88 J. Personality & Soc. Psych. 447 (2005) (documenting empirical evidence of implicit beliefs that Asian Americans are not "American").

were legislatively excluded from entering the United States and from gaining citizenship. *See, e.g.*, Tydings-McDuffie Act of 1934, ch. 84, 48 Stat. 456 (1934) (amended 1946) (imposing annual quota of fifty Filipino immigrants); Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (repealed 1952); Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952) (establishing an "Asiatic barred zone"); Geary Act, ch. 60 § 1, 27 Stat. 25 (1892); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61 (repealed 1943) (prohibiting Chinese workers from entering the United States); Naturalization Act of 1790, ch.3, 1 Stat. 103 (limiting naturalization to "free white persons"). People of Asian descent were ineligible for citizenship because they were considered neither African American nor White. *See Ozawa v. United States*, 260 U.S. 178, 198 (1922). Exclusion from citizenship consequently excluded Asian American immigrants from the right to vote.

Asian Americans were also subject to other discriminatory laws. They were removed from their homes and confined to areas set aside for slaughterhouses and other businesses thought prejudicial to public health or comfort. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (describing San Francisco ordinance). They were denied the right to own land and related real property rights. *See, e.g., Webb v. O'Brien*, 263 U.S. 313 (1923) (upholding California Alien Land Law prohibiting land rights for "aliens ineligible for citizenship"); *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding similar Alien Land Law in Washington); *see also* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. Rev. 37 (1998) (describing history of Alien Land Laws, which, while facially race-neutral, were passed in response to Japanese immi-

grants competing for agricultural land). They faced a number of other discriminatory laws ranging from foreign miner taxes, directed at Chinese gold miners, to anti-Asian business regulations. *See* Sucheng Chan, *Asian Americans: An Interpretative History* 46-47 (1991).

Perhaps the most egregious and best documented example of discriminatory treatment of Asian Americans by society and the law was the internment, without due process, of over 120,000 Japanese Americans during World War II. The internment was executed by Executive Order 9066, signed by President Roosevelt and sanctioned by the Court. *See Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment). Although Germany and Italy, too, were enemies, the United States did not accord similar treatment to German Americans or Italian Americans.

This summary illustrates the historical context against which discrimination against Asian American voters occurs today. Indeed, the hallmark of historical discrimination against Asian Americans—discrimination motivated by the perception of Asian Americans as outsiders—continues in the present era, as seen in various instances of discrimination against Asian American voters across the country:

> In 2005, a citizen named Martin Ringhofer challenged the right to vote of more than one thousand people with "foreign sounding" names, targeting primarily Asian American and Latino voters. Mr. Ringhofer targeted voters with names that "have no basis in the English language" and "appear to be from outside the United States" while eliminating from his challenge voters with

names "that clearly sounded American-born, like John Smith, or Powell." *See Narasaki Statement, supra*, at 7; Jim Camden, Man Says Votes from Illegal Immigrants (March 31, 2005), *available at* http://www.spokesmanreview.com/local/story.asp?ID=61944.

In 2004, an election judge in Cook County, Illinois, when asked why a Chinese ballot booth was not clearly marked as such, the election judge replied, "They don't need them anyway. They just use a piece of paper and punch numbers. They don't read the names anyway, so it doesn't matter." *See* Nat'l Asian Pacific Legal Consortium, *Sound Barriers: Asian Americans and Language Access in Election* 2004 10 (2005), *available at* http://65.36.162.215/files/sound_barriers.pdf.

In Los Angeles Koreatown during the 2004 general elections, a precinct inspector gave certain Asian American voters time limits and sent at least one Asian American voter to the back of the line. *See Testimony of EunSook Lee, Executive Director of the National Korean American Service & Education Consortium (NAKASEC) before the Nat'l Comm'n on the Voting Rights Act* (Sept. 27, 2005), *available at* http://www.votingrightsact.org/hearings/pdfs/lee_eunsook.pdf.

C. Section 5 Is Needed To Combat Discrimination Against Politically Emerging Asian American Populations.

Given the history of racial discrimination against Asian Americans, the continuing perception of Asian Americans as foreigners and outsiders, and the growth of Asian American populations in Section 5-covered jurisdictions, Section 5 remains relevant and

provides an important tool in combating voting discrimination against politically emerging Asian American populations.

One prominent example of voting discrimination against Asian Americans occurred in Bayou La Batre, Alabama in August 2004. Bayou La Batre is a fishing village of less than 3,000 residents. Asian Americans began settling in Bayou La Batre after the Vietnam War in the 1970s, and now make up about one-third of Bayou La Batre's population. *See generally*, Frye Gaillard, *After the Storms: Tradition and Change in Bayou La Batre*, 94 Journal of American History 856 (Dec. 2007), *available at* http:// www.journalofamericanhistory.org/projects/katrina/Gaillard.html. Though Asian Americans have been in Bayou La Batre for many years, until recent elections their political participation has been minimal. For example, in 1996, only 15 of 800 votes cast in local elections were by Asian Americans. Spencer Overton, *Stealing Democracy: the New Politics of Voter Suppression* 74 (2006).

Though Bayou La Batre's population is diverse, racial animus against Asian Americans came to the forefront when an Asian American candidate ran for city council for the first time in the city's history. In the 2004 primary elections, Phuong Tan Huynh ran for a city council position against a white incumbent, J.E. "Jackie" Ladnier. Ladnier and his supporters challenged about fifty Asian American voters at the polls, to their faces, complaining that the voters were not U.S. citizens or city residents, or that they had felony convictions. *See id.* at 75; DeWayne Wickham, *Why renew Voting Rights Act? Ala. Town provides answer*, USA Today (Feb 22, 2006), *available at* http://www.usatoday.com/news/opinion/editorials/2006-

02-22-forum-voting-act_x.htm. These challenges constituted "scare tactics," which intimidated many who had been confronted. *See Challenged Asian ballots in council race stir discrimination concern*, Associated Press State & Local Wire (Aug. 29, 2004).[13] As explained by Ladnier, his supporters "figured if [Asian American voters] couldn't speak good English, they possibly weren't American citizens." *See Overton*, *supra* at 75. The challenged voters had to complete a paper ballot and have the paper ballot vouched for by a registered voter.

The U.S. Department of Justice confirmed that the challenges were race-based, and prohibited the challenges in the city's 2004 general election. *See* Katherine Sayre, *Feds to monitor election in Bayou La Batre*, al.com Press-Register (Aug. 26, 2008), *available at* http://www.al.com/news/press-register/index.ssf?/base/news/1219742108217850.xml&coll=3; *Wickham*, *supra*. Huyhn eventually won the council position by 100 votes. *See Overton*, *supra* at 76. However, concern about racial animus against Asian American voters persisted through 2008. The U.S. Department of Justice monitored the treatment of voters in Bayou La Batre in August and October 2008 to ensure compliance with the Voting Rights Act. *See* Sayre, *supra*; U.S. Dep't of Justice, *Justice Department to Monitor Elections in Alabama* (Oct. 6, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/October/08-ag-900.html; U.S. Dep't of Justice, *Justice Department to Monitor Three Local Elections in Ala-*

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[13] Huynh's sister, Linh Huyhn Tran, stated of the challengers, "These people were just hoping that if they challenged our voters, they would just back out. They'd feel like they were in some kind of trouble or they'd be intimidated by all the paperwork in English." *See Challenged Asian ballots*, *supra*.

bama and Florida (Aug. 25, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/August/08-crt-747.html.

CONCLUSION

The Voting Rights Act, including Section 5, must be viewed in the context of this country's long struggle to protect the civil rights of racial minorities against discrimination. Although there has been much progress, much of it the result of the Voting Rights Act itself, disparities in voter registration and actual voting among Asian Americans as compared to white Americans, a lack of Asian American electoral representation, and acute instances of discrimination against Asian American voters around the country and particularly in Section 5 jurisdictions indicate that much needs to be done to secure equal opportunity for racial minorities to participate in our system of democracy. *See Bartlett*, 2009 U.S. LEXIS 1842 at *42. Congress has recognized that Section 5 is a vital tool in the fight to vindicate the voting rights of racial minorities, and the Court should uphold Congress's 2006 reauthorization of Section 5 as a valid and necessary exercise of its enforcement powers under the Fourteenth and Fifteenth Amendments.

Respectfully submitted,

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March 25, 2009

APPENDIX

List of *Amici Curiae*

Asian American Business Roundtable (AABR)

The Asian American Business Roundtable (AABR) was established in 1989 to help Asian and other minority-owned businesses access federal procurement, expand their market base with the Federal Government as well as the commercial sector by providing information that is accurate and timely to enable them to make informed decisions beneficial to their companies. AABR has a long-standing interest in voting rights and protecting the rights of Asian Americans to access the polls. This interest has resulted in AABR's participation in a number of amicus briefs before the courts.

Asian American Institute (AAI)

Asian American Institute (AAI) is a pan-Asian, non-partisan, not for profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, by utilizing coalition building, education, and research. AAI's programs include community organizing, leadership development, and legal advocacy. Asian Americans are a diverse and often overlooked community, but they are one of the fastest-growing populations in the United States. AAI is committed to ensuring that Asian Americans are able to vote and are unencumbered by barriers such as racial discrimination, inaccessible poll sites, and non-compliance with language assistance obligations. Through poll watching and exit polling, AAI works to document the difficulties that place unwarranted burdens upon Asian American voters. AAI thus has

an important interest in Section 5's protection of Asian American voters.

Asian Law Alliance (ALA)

The Asian Law Alliance (ALA), founded in 1977, is a nonprofit public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. ALA has advocated for the voting rights of limited English speaking citizens residing in Santa Clara County for the past 15 years.

Asian Law Caucus (ALC)

The Asian Law Caucus is the nation's oldest legal and civil rights organization serving the low-income Asian Pacific American communities. The mission of the Asian Law Caucus is to promote, advance and represent the legal and civil rights of the Asian and Pacific Islander communities. Recognizing that social, economic, political and racial inequalities continue to exist in the United States, the Asian Law Caucus is committed to the pursuit of equality and justice for all sectors of our society with a specific focus directed toward addressing the needs of low-income Asian and Pacific Islander. Such pursuit includes an interest in voting rights and protecting the rights of Asian Americans to access the polls, which in turn has resulted in the Asian Law Caucus' participation in a number of amicus briefs before the courts.

Asian Pacific American Labor Alliance, AFL-CIO (APALA)

The Asian Pacific American Labor Alliance (APALA), AFL-CIO, is the first and only national

organization of Asian Pacific American union members. It organizes and works with Asian Pacific American workers, many of them immigrants, to build the labor movement and address exploitative conditions in the workplace. APALA has a long-standing interest in voting rights and protecting the rights of Asian Pacific Americans. This interest has resulted in APALA's participation in a number of amicus briefs before the courts.

Asian Pacific American Legal Center of Southern California (APALC)

Founded in 1983, the Asian Pacific American Legal Center of Southern California (APALC) is the nation's largest non-profit public interest law firm devoted to the Asian American and Pacific Islander community. APALC provides direct legal services to indigent members of our community and uses impact litigation, policy advocacy, community education and leadership development to obtain, safeguard and improve the civil rights of Asian Americans and Pacific Islanders. APALC's civil rights litigation has covered a broad range of issues such as race and national origin discrimination, access to higher education, immigration and naturalization, language rights and garment worker rights. APALC has a long history of working to protect the voting rights of historically disenfranchised communities and thus has a strong interest in the outcome of this case.

Asian Pacific American Legal Resource Center (APALRC)

The Asian Pacific American Legal Resource Center (APALRC) is the Capital Region's nonprofit advocate advancing the legal and civil rights of Asian Pacific Americans through direct services, education, and

advocacy. APALRC serves the individual legal needs of low-income and limited-English proficient Asian Pacific Americans and advocates for broad-based systemic change on legal and civil rights issues impacting Asian Pacific Americans. APALRC is committed to ensuring that Asian Pacific Americans are able to vote. APALRC has conducted poll monitoring and exit polling in Virginia during the 2004 election and in Virginia, Washington DC, and Maryland during the 2006 and 2008 elections. These jurisdictions continue to lack significant local or statewide Asian Pacific American elected representation despite the exponential growth of the Asian Pacific American communities. Through APALRC's poll watching and exit polling, APALRC has documented the ongoing barriers that prevent equal participation by Asian Pacific American voters. APALRC thus supports ensuring the right to vote of Asian Pacific Americans through Section 5 of the Voting Rights Act.

Asian & Pacific Islander American Health Forum (APIAHF)

The Asian & Pacific Islander American Health Forum (APIAHF) is a national advocacy organization dedicated to promoting policy, program, and research efforts to improve the health and well-being of Asian American, Native Hawaiian, and other Pacific Islander ("AA and NHPI") communities. Founded in 1986, APIAHF approaches activities with the philosophy of coalition-building and developing capacity within local AA and NHPI communities. We advocate on health issues of significance to AA and NHPI communities, conduct community-based technical assistance and training, provide health and U.S. Census data analysis and information dissemination, and

convene regional and national conferences on AA and NHPI health. Our health and well-being advocacy extends to an interest in increased participation in the electoral process within the AA and NHPI communities and results in our participation in this amicus brief.

Asian & Pacific Islander American Vote (APIAVote)

Asian and Pacific Islander American Vote (APIAVote) is a national nonpartisan, nonprofit organization that encourages and promotes civic participation of Asian Pacific Islander Americans in the electoral and public policy processes at the national, state and local levels. We envision a society in which all Asian Pacific Islander Americans fully participate in and have access to the democratic process. As such, APIAVote has a long-standing interest in voting rights and protecting the rights of Asian Americans and Pacific Islanders to access the polls. This interest has resulted in APIAVote's participation in a number of amicus briefs before the courts.

Boat People SOS, Inc. (BPSOS)

BPSOS is a national immigrant services organization serving primarily Vietnamese refugees and immigrants with 13 branch offices nationwide. BPSOS' domestic operation includes a large array of human and immigration services for Vietnamese refugees and immigrants. They were denied basic civil rights, including the right to choose the form of government and the ruling party. When moving to America, many of these Vietnamese settled in enclaves in states and counties with egregious voting records. It is imperative that this new voting population is allowed to exercise their rights as Americans and not

experience disenfranchisement due to discrimination. Additionally, BPSOS has a branch office in Bayou La Batre, Alabama where there was significant voter disenfranchisement of Vietnamese Americans in the past two elections. It is because of this interest that BPSOS participates in the brief.

Chinese for Affirmative Action (CAA)

Chinese for Affirmative Action (CAA) was founded in 1969 to protect the civil and political rights of Chinese Americans and advance multiracial democracy in the United States. Today, CAA is a progressive voice in and on behalf of the broader Asian and Pacific American community. Advocates for systemic change that protects immigrant rights, promotes language diversity, and ensures racial injustice. CAA has a long-standing interest in voting rights and protecting the rights of Chinese Americans to access the polls. This interest has resulted in CAA's participation in a number of amicus briefs before the courts.

Fred T. Korematsu Center for Law and Equality (Korematsu Center)

The Fred T. Korematsu Center for Law and Equality (Korematsu Center) is a nonprofit organization based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the internment of 110,000 Japanese Americans. He took his challenge of the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to suc-

cessfully challenge his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice for all. It has a special interest in promoting participation in the democratic process through protecting voting rights and access to the polls. We note that the Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

Hmong National Development, Inc. (HND)

Hmong National Development, Inc. (HND) is a national 501(c)(3) nonprofit organization dedicated to building capacity, developing leadership and empowering the Hmong American community. HND works with local and national organizations, public and private entities, and individuals to promote educational opportunities, increase community capacity, and develop resources for the well-being, growth, and full participation of Hmong in society. HND has a long-standing interest in ensuring and protecting the voting rights of all Hmong to access the polls. This interest has resulted in HND's participation in a number of amicus briefs before the courts.

Japanese American Citizens League (JACL)

The Japanese American Citizens League (JACL), founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan civil rights organization with 113 chapters throughout the continental United States, Hawaii', and Japan. The mission of the JACL is to uphold the civil and human rights of Americans of Japanese Ancestry and of all people. The JACL played a prominent role in obtaining redress for Japanese Americans who were in-

terned during World War II. The JACL has also worked to educate against and combat discrimination on the basis of race, national origin, age, ethnicity, gender, or disability, and to protect the right of all persons to equal participation in the political process. In the past, the JACL has helped lead the Asian Pacific American community in the expansion and reauthorization of provisions of the Voting Rights Act in 1992 and 2006. Further, the JACL has committed to and adopted Resolutions supporting the Voting Rights Act at the JACL National Convention in 2006. Understanding the meaning and acknowledging the importance of the disenfranchising effect when voting rights are limited or eliminated for certain racial minorities, Amici thus has an important and substantial interest in this case.

National Asian Pacific American Bar Association (NAPABA)

The National Asian Pacific American Bar Association (NAPABA) is the national association of Asian Pacific American attorneys, judges, law professors, and law students, providing a national network for its members and affiliates. NAPABA advocates for the legal needs and interests of the Asian Pacific American community and represents the interests of over 40,000 attorneys and 58 local Asian Pacific American bar associations, who work variously in solo practices, large firms, corporations, legal services organizations, non-profit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has been at the forefront of national and local activities in the areas of civil rights. In furtherance of its mission to promote justice, equity, and opportunity for Asian Pacific Americans,

NAPABA works to protect Asian Pacific Americans' right to vote and participate in the electoral process.

National Korean American Service & Education Consortium (NAKASEC)

The National Korean American Service & Education Consortium is a national non-profit organization based in Los Angeles, California with a Washington DC office. NAKASEC affiliates are the Korean American Resource & Cultural Center in Chicago and the Korean Resource Center in Los Angeles. Founded in 1994, NAKASEC is a multi-issue civil rights and human rights organization based in the Korean American community. NAKASEC's mission is to project a national progressive voice for Korean Americans and promote their full participation in the United States. To this end, NAKASEC promotes equitable and just changes to the political and legislative systems through a combination of education and policy advocacy with grassroots organizing and community mobilization.

National Asian Pacific American Women's Forum (NAPAWF)

The National Asian Pacific American Women's Forum (NAPAWF) is the only national, multi-issue Asian Pacific American ("APA") women's organization in the country and works to build a movement to advance social justice and human rights for APA women and girls. To this end, NAPAWF supports protecting the right of all individuals to engage in the democratic process by having access to the polls.

Organization of Chinese Americans, Inc. (OCA)

Founded in 1973 as Organization of Chinese Americans, Inc., OCA is a 501(c)(3) national non-

profit, nonpartisan organization dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans in the United States. With over 80 chapters and affiliates across the nation, OCA's aims are to advocate for social justice, to promote civic participation, to advance coalitions and community building, and to foster cultural heritage. OCA monitors issues and policies that affect the Asian Pacific American community. OCA and its chapters have conducted poll monitoring/exit polling during the 2002, 2004, 2006 and 2008 elections.

Sikh American Legal Defense and Education Fund (SALDEF)

The Sikh American Legal Defense and Education Fund (SALDEF) is the oldest Sikh American civil rights and advocacy organization in the United States. Founded as the Sikh Mediawatch and Resource Task Force (SMART) in 1996, SALDEF empowers Sikh Americans through legal assistance, educational outreach, legislative advocacy, and media relations. SALDEF has over a decade of experience in working with other Sikh and minority organizations in providing public policy, advocacy, and community education on discrimination issues. SALDEF has a strong interest in voting rights and protecting the rights of Asian Americans to access the polls.

Southeast Asia Resource Action Center (SEARAC)

Southeast Asia Resource Action Center (SEARAC) was founded in 1979 to facilitate the relocation of Southeast Asian refugees into American society as well as the development of nonprofit organizations led by and for Southeast Asians. SEARAC's principal

mission is to advance the interests of Southeast Asian Americans by promoting community empowerment and leadership development, as well as advocating for and representing the diverse Southeast Asian American community on issues and concerns such as education, health care, safety, economic development, and civil rights. We also foster civic engagement among Southeast Asian Americans, and represent our communities at the national level in Washington, D.C. As such, we have a strong interest in ensuring the voting rights of Southeast Asian Americans and strive to protect their access to the polls.

AMICUS CURIAE BRIEF

08-322

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

—v.—

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, *ET AL.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF APPELLEES

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March 25, 2009

ADDITIONAL *AMICI CURIAE*

Additional *amici curiae* are the following organizations that represent Asian American voters and have conducted voter registration drives, voter education events, and election protection activities on Election Day.

AMERICAN CITIZENS FOR JUSTICE
ASIAN AMERICAN BAR ASSOCIATION OF GREATER CHICAGO
ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK
ASIAN AMERICAN LAWYERS ASSOCIATION OF MASSACHUSETTS
ASIAN AMERICAN LEAD
ASIAN AMERICAN SOCIETY OF CENTRAL VIRGINIA
ASIAN COMMUNITY DEVELOPMENT CORPORATION OF BOSTON
ASIAN PACIFIC AMERICAN AGENDA COALITION
ASIAN PACIFIC AMERICAN BAR ASSOCIATION OF THE GREATER WASHINGTON, DC AREA
ASIAN PACIFIC AMERICAN BAR ASSOCIATION OF PENNSYLVANIA
ASIAN PACIFIC AMERICAN LABOR ALLIANCE
ASIAN PACIFIC AMERICAN LEGAL RESOURCE CENTER
ASIAN PACIFIC ISLANDER AMERICAN VOTE
CAMBODIAN ASSOCIATION OF GREATER PHILADELPHIA
CHINESE AMERICAN VOTERS ASSOCIATION
CHINESE PROGRESSIVE ASSOCIATION
COALITION OF ASIAN PACIFIC AMERICANS OF VIRGINIA
FILIPINO AMERICAN HUMAN SERVICES, INC.
KOREAN AMERICAN LEAGUE FOR CIVIC ACTION
KOREAN AMERICAN RESOURCE & CULTURAL CENTER
KOREAN AMERICAN VOTERS' COUNCIL OF NY & NJ
KOREAN COMMUNITY SERVICE CENTER OF GREATER WASHINGTON, DC
MARYLAND VIETNAMESE MUTUAL ASSOCIATION
MASSVOTE
MUSLIM BAR ASSOCIATION OF NEW YORK
NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM
NATIONAL KOREAN AMERICAN SERVICE & EDUCATION CONSORTIUM
NORTH AMERICAN SOUTH ASIAN BAR ASSOCIATION
OCA
ONE LOWELL
ONE NEVADA
PHILADELPHIA CHINATOWN DEVELOPMENT CORPORATION

Providence Youth and Student Movement
The Sikh Coalition
South Asian Americans Leading Together
South Asian Bar Association of Michigan
South Asian Bar Association of New York
South Asian Youth Action!
Vietnamese American Initiative for Development
Vietnamese American Young Leaders Association of New Orleans
YKASEC - Empowering the Korean American Community

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INTERESTS OF *AMICI CURIAE*

Non-parties Asian American Legal Defense and Education Fund ("AALDEF") and [others] (collectively, "*Amici Curiae*" or "*Amici*") are organizations that advocate on behalf of Asian American voters and have conducted voter registration drives, voter education events, and election protection activities on Election Day.[1]

In particular, AALDEF is a 35-year-old national civil rights organization based in New York City that promotes and protects the civil rights of Asian Americans through litigation, legal advocacy, and community education. AALDEF has monitored elections through annual multilingual exit poll surveys since 1988. AALDEF has collected valuable data that documents both the use of, and the continued need for, protection under the Voting Rights Act of 1965. In 2008, AALDEF expanded its survey and dispatched over 1,500 volunteers to 130 poll sites, covering 39 cities in 11 states. The survey, the largest of its kind, polled 16,665 Asian American voters. A significant component of

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[1] Counsel of record for Appellant and all Intervenor-Appellees have previously provided consent to the filing of this brief. Counsel for Appellee was timely notified of the intent to file this brief under S. Ct. R. 37.2(a) and has also consented to its filing; its consent letter has been filed with the Clerk of the Court. Counsel for *Amicus Curiae* AALDEF researched and drafted this brief with the advice and consent of all *amici*. No counsel for a party in this Court authored this brief, in whole or in part, and no party in this Court or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

AALDEF's mission is to ensure that Asian Americans have an equal opportunity to participate in the voting process.

Amici submit this brief in support of Appellee and Intervenor-Appellees to ensure that the discrimination Asian Americans face at the polls is accurately and fairly considered in determining whether Congress acted within the scope of its enforcement powers in reauthorizing Section 5 of the Voting Rights Act.[2]

SUMMARY OF ARGUMENT

Amici curiae submit this brief to highlight the discrimination faced by Asian Americans and the continuing need to uphold Section 5 of the Voting Rights Act to protect Asian Americans and their right to vote and participate on an equal basis in the political process. As Appellee and Intervenor-Appellees demonstrate, the contention advanced by Appellant Northwest Austin Municipal Utility District No. 1 – that Congress lacked sufficient evidence of racial discrimination in voting to justify the provision's intrusion upon state sovereignty when it extended Section 5 in 2006 – was correctly rejected by the District Court. Indeed, AALDEF submitted significant evidence to Congress in support of the reauthorization of the Voting Rights Act. In addition to the persuasive reasoning of the District Court, the Voting Rights Act has had (and continues to have) a deep impact on the

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[2] Statements of interest for the other *amici* are included in the Appendix to this brief.

Asian American community, especially in light of the long history of racism and discrimination that Asian Americans have faced in this country. This brief serves to illuminate the Court on this valuable, but often omitted, perspective.

Justice requires society as a whole, and the Government in particular, to vigilantly safeguard the rights of its citizens to vote and participate in the democratic process. The impact of Section 5 on protecting the voting rights of Asian Americans is amply illustrated through the community's experiences in seeking language assistance at the polls, monitoring changes in poll sites, ensuring proper participation and representation in local elections, and scrutinizing redistricting efforts. Moreover, underlying societal discrimination against American citizens of Asian ancestry casts them as perpetual foreigners and immigrants. This misperception has become particularly worrisome as the country has become more hostile towards immigrants, leading to enduring discrimination at poll sites and negatively affecting the ability of Asian Americans to participate fully in the electoral process. Section 5 is a critical mechanism for combating these systemic problems.

Accordingly, this Court should affirm the judgment of the District Court, concluding that Section 5 of the Voting Rights Act continues to be necessary, and that Congress properly exercised its powers under the Reconstruction Amendments when it reauthorized the law. A ruling to the contrary would lead to an overturning of

Congress' deliberative fact-finding process, leaving Asian Americans without the necessary protections to exercise their right to vote.

ARGUMENT

I. Section 5 of the Voting Rights Act Protects the Voting Rights of Asian Americans

Section 5 of the Voting Rights Act of 1965 requires certain states and localities with a history of racial discrimination to obtain federal approval of changes in voting practices. Once a jurisdiction is covered, Section 5 requires that changes to any voting qualification, standard, practice, procedure, or redistricting plan be "precleared" by the U.S. Department of Justice ("DOJ") or the United States District Court for the District of Columbia before going into effect. *See* 42 U.S.C. § 1973c. To obtain preclearance, the jurisdiction must show that the proposed change does not have the purpose or effect of denying or abridging the right to vote because of race or color. *See id.* If preclearance is denied, then the change cannot be implemented. *See id.*

Section 5 has had an enormous impact on the ability of Asian Americans to fully exercise their right to vote. For example, in a covered jurisdiction such as New York City – the city with the nation's largest Asian American population – Section 5 has protected Asian Americans from discriminatory voting changes. *See* 28 C.F.R. part 51, App.; Jessica S. Barnes & Claudette E.

Bennett, U.S. Census Bureau, The Asian Population: 2000, at 7, Table 3 (2002), available at http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf (last visited Mar. 20, 2009). The four most notable examples relate to (a) providing language assistance at the polls; (b) monitoring changes in poll sites; (c) ensuring proper Asian American participation and representation in local elections; and (d) scrutinizing redistricting efforts.[3]

A. Section 5 Helps Provide Asian Americans With Greater Access to Their Voting Rights, Particularly in Jurisdictions Covered By the Language Assistance Provisions of the Voting Rights Act

In reauthorizing Section 5 of the Voting Rights Act, the House Judiciary Committee reported on instances of discriminatory tactics and efforts on the part of local officials to keep covered language minority citizens from registering and casting effective ballots from many different jurisdictions. *See* H.R. Rep. No. 109-478, at 45 (2006). For example, in a number of states, language minority citizens were subject

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[3] Most of the examples and findings below pertain to New York City because that city is covered under Section 5. Moreover, New York City, with a sizeable Asian American population, *see* Barnes & Bennett, *supra*, at 7, is one of the few places in the country covered under both Section 5 and Section 203, the language assistance provisions of the Voting Rights Act.

to harassment by others who challenged their citizenship status solely on the basis of their surnames or ethnicity. *See* AALDEF, Asian American Access to Democracy in the 2004 Elections: Local Compliance with the Voting Rights Act and Help America Vote Act (HAVA) in NY, NJ, MA, RI, MI, IL, PA, VA 15-16 (2005), available at http://www.aaldef.org/articles/2005-08-18_189_ AsianAmericanA.pdf (last visited Mar. 6, 2009); *see also* Robert Kengle, Voting Rights in Georgia: 1982-2006 (Mar. 2006), available at http://www.civilrights.org/voting-rights/vra/states/GeorgiaVRA.pdf (last visited Mar. 20, 2009).

Section 5 has had its greatest influence on the ability of Asian Americans to participate in the political process in the context of providing language assistance at the polls. Section 203 of the Voting Rights Act requires covered jurisdictions to provide translated ballots and voting materials, as well as oral language assistance, for voters who are limited English proficient. *See* 42 U.S.C. § 1973aa-1a(c). Section 5 requires that any plans to comply with Section 203, or changes to current practices to comply with that section, must be precleared. *See* 42 U.S.C. § 1973b(f)(3-4) (applying Section 5 coverage trigger to language assistance obligations). Interested individuals and community groups may review the submission and provide comments during the preclearance period. *See* 28 C.F.R. § 51.29.

When jurisdictions are covered under both Section 5 and 203 for Asian language assistance – such as New York and Kings Counties in New York City and Harris County, Texas – the two provisions together have been powerful tools to ensure that language minorities have full access to political participation. Section 203 provides for language assistance; Section 5 enforces Section 203 so as to ensure that any changes to the provision of language assistance are not retrogressive.

For example, Section 5 played a pivotal role in shaping the Chinese Language Assistance Program in New York, which was first adopted after the city gained coverage under Section 203 in 1992. Limited English proficient Chinese-American voters typically know the candidates by their transliterated names. These names appear in Asian-language media outlets, advertising, public notices, and campaign literature. *See* AALDEF, The Asian American Vote, A Report of the AALDEF Multilingual Exit Poll in the 2004 Presidential Election 12 (2005) (finding that more than a third (35%) of Asian American voters turned to ethnic media outlets in Asian languages for their main source of news about politics and community issues), available at http://www.aaldef.org/articles/2005-04-20_67_TheAsianAmeric.pdf (last visited Mar. 6, 2009). In the 1994 election cycle, community groups pressed for fully translated ballots that included the transliteration of the candidates' names in Chinese. Ultimately, the denial of preclearance of the New York City Board of Election's language

assistance program under Section 5 is precisely what forced the Board to provide fully translated ballots. Section 5's comment and preclearance process gave community groups and individuals the valuable opportunity to shape the nature and scope of meaningful language assistance programs. *See* Voting Rights Act: Section 203-Bilingual Election Requirements, Part I Before the House Subcomm. on the Const., House Judiciary Comm., 109th Cong. 19 (2005) (statement of Margaret Fung, AALDEF, Exec. Dir.); *see also* Letter from D. Patrick, U.S. Dep't of Justice to K. King, Gen. Counsel, New York City Bd. of Elections (May 13, 1994) (denying preclearance; on file with counsel).

The interaction between Section 5 and 203 also became evident after the 2000 Census in the provision of language assistance. The census reported a sixty-six percent (66%) growth in the Asian American population in New York. *See* Barnes & Bennett, *supra*, at 5, Table 2. Commensurate with this growth, the number of poll sites and election districts targeted to provide language assistance significantly increased. *See* AALDEF, Asian Americans and the Voting Rights Act: The Case for Reauthorization 42-43 (2006) (hereinafter, "AALDEF Report") (submitted to Congress and available at http://www.aaldef.org/articles/2006-06-13_137_AALDEFReleases.pdf (last visited Mar. 6, 2009)).

Despite this population growth, the Board tried to curtail its language assistance program by proposing a change in its targeting formula.

The Board sought to change its methodology for targeting language assistance at certain poll sites, resulting in the removal of Chinese language assistance at nearly 70 poll sites in heavily populated neighborhoods. The change would also remove 16 sites for Korean language assistance. *See* AALDEF Report at 43. In response, AALDEF submitted comments in opposition to preclearance under Section 5, arguing that the change was retrogressive. *See* Letter from G. Magpantay, AALDEF Staff Attorney to J. Rich, U.S. Dep't of Justice (Oct. 17, 2003) (submitted to Congress with AALDEF Report and on file with counsel).

In deciding whether to interpose an objection, the DOJ sent the Board a "more information" request letter, asking for more detailed information to refute AALDEF's contentions. It also gave the city another opportunity to demonstrate that the change would not place Asian Americans in a worse position to exercise their right to vote. Upon receiving the city's response, along with AALDEF's opposition letter, the Board withdrew its submission to change the targeting formula. *See* AALDEF Report at 43. Only because of Section 5 was Section 203 fully implemented in New York City.

B. Section 5 Ensures that Changes to Poll Sites Do Not Infringe on Asian Americans' Right to Vote

Changes to poll sites are disruptive to the ability of Asian Americans to vote. In every election that AALDEF has monitored in New York City, the Board has failed to take reasonable steps to ensure that Asian American voters are informed of their correct poll sites. Voters have been misinformed about their poll sites before the elections or misdirected by poll workers at poll sites on Election Day. Section 5 has helped to minimize these disruptions.

The preclearance requirement serves an important and mandatory public notice function: Any changes to the locations of designated poll sites must be submitted for preclearance, and, once submitted, the Attorney General must notify interested individuals and groups of the proposed submission, as well as provide copies of detailed submissions to groups who request the information. *See* 28 C.F.R. §§ 51.32, 51.33. Experience has shown that Section 5 has prevented sudden poll sites closures in Asian American neighborhoods that would otherwise have been made without any notice to the community. Even in emergencies, poll site changes, absent notice, constitute violations of Section 5. *See* AALDEF Report at 41.

For example, in 2001, the primary elections were scheduled for September 11, but were cancelled due to the attacks on the World Trade

Center and rescheduled for September 25. The week before the rescheduled primaries, AALDEF discovered that a certain poll site, I.S. 131, a high school located in the heart of Chinatown and within the restricted zone in lower Manhattan, was being used by the Federal Emergency Management Agency for services related to the World Trade Center disaster. The Board chose to close down the poll site, but failed to inform voters of the change. The Board managed, however, to submit the proposed change to the DOJ for preclearance under Section 5. *See id.*

AALDEF filed oral comments with the DOJ urging for an objection because no notice had been given to voters. The Board provided no media announcement to the Asian language newspapers, made no attempts to send out a mailing to voters, and failed to arrange to place signs or poll workers at the site to redirect voters to other poll sites. In fact, no consideration at all was made for the fact that the majority of voters at this site were limited English proficient, and that the site had been targeted for Asian language assistance under Section 203. AALDEF contended that the Board should have considered placing bilingual poll workers and translated signs at the poll site directing voters to alternate poll sites. *See id.*

Thereafter, the DOJ issued an objection and informed the Board that the change could not take effect. The elections subsequently took place as originally planned at I.S. 131, and hundreds of votes were cast on September 25. *See id.*

Without Section 5, those voters would undoubtedly have lost their right to vote.

C. Section 5 Prevents Retrogressive Effects on Asian American Voting Power

Before 2001, in New York City, the only electoral success for Asian Americans was on local community school boards. In each election – in 1993, 1996, and 1999 – Asian American candidates ran for the school board and won. *See* Lynette Holloway, "This Just In: May 18 School Board Election Results," N.Y. Times (June 13, 1999); Jacques Steinberg, "School Board Election Results," N.Y. Times (June 23, 1996); Sam Dillon, "Ethnic Shifts Are Revealed in Voting for Schools," N.Y. Times (May 20, 1993). These remarkable gains stood, at the time, in stark contrast to the total absence of Asian Americans in the City Council, State Legislature, or Congress, despite a city-wide population of over 800,000 Asian Americans. *See* Nicole Bode, "Asians Rip Redistricting Group Says New Boundaries Would Sap Voting Strength," N.Y. Daily News (Feb. 20, 2002); Jim O'Grady, "Asian Americans Diving Gracefully Into Political Water," N.Y. Times (May 6, 2001).

The school boards used an alternative voting system known as "single transferable voting" or "preference voting." Instead of selecting one representative from single-member districts, voters ranked candidates in order of preference, from "1" to "9." *See* Thomas T. Mackie

& Richard Rose, The International Almanac of Electoral History 508 (3d ed. 1991). In 1998, New York opted to change the voting system from "preference voting," in which voters ranked their choices, to a different system of "limited voting," where voters could select only four candidates for the nine-member board, and the nine candidates with the highest number of votes were elected. *See* 1998 N. Y. Sess. Laws 569-70 (McKinney).

This voting change was submitted to the DOJ for preclearance. AALDEF submitted comments to the DOJ in opposition to the change and urged denial of preclearance because Asian American voters would be in a worse position to elect candidates of their choice. *See* Letter from M. Fung, AALDEF Exec. Dir., and T. Sinha, AALDEF Staff Attorney to E. Johnson, U.S. Dep't of Justice (Oct. 8, 1998) (submitted to Congress with AALDEF Report and on file with counsel). The DOJ, using its authority under Section 5, interposed an objection and prevented the voting change from taking effect. *See* Voting Rights Act: Section 5 of the Act-History, Scope, and Purpose, Hearing Before the House Subcomm. on the Const., House Judiciary Comm., 109th Cong. 1664-66 (2005) (appendix to statement of the Honorable Bradley J. Schlozman, U.S. Dept. of Justice) (providing Section 5 objection letter to Board and summarizing changes made to the voting methods, along with overall objections to the changes).

D. Section 5 is an Effective Tool in Ensuring that Asian Americans Are Not Discriminated Against In Redistricting Plans

Finally, Section 5 has also been used by Asian Americans to comment on redistricting plans. After the 1990 and 2000 Censuses, AALDEF, along with many community groups, submitted comments under Section 5 on the redistricting plans for the New York City Council and New York State Legislature. *See* AALDEF Report, App. O thereto. AALDEF asserted that Asian American neighborhoods should be kept within a single district, documenting political cohesion among Asian American voters and the presence of communities of interest within certain districts. AALDEF also objected to proposed city council redistricting plans that would have joined Manhattan's Chinatown, where mostly lower-income Chinese reside, with the heavily white, upscale neighborhoods of Soho, Tribeca and Battery Park City. *See* Letter from M. Fung, AALDEF Exec. Dir., *et al.* to J. Rich, U.S. Dep't of Justice (Apr. 29, 2003) (submitted to Congress with AALDEF Report and on file with counsel).

Section 5 provided the mechanism for Asian Americans to comment on voting changes that would deny them a meaningful opportunity to elect candidates of their choice. Without this opportunity to participate in and scrutinize the redistricting process, the Asian American voice would be largely ignored, leading to disenfranchising consequences at the polls.

In short, Section 5 is a critical component of the Voting Rights Act, allowing Asian Americans full access to voting and affording them a powerful tool to fight efforts to quiet their voices. There is little doubt that Asian Americans would be denied opportunities to participate equally in the electoral process without the protections afforded under Section 5. This Court should affirm Congress' determination that Section 5 remains necessary to protect voters in minority populations.

II. Asian Americans Continue To Face Historical Discrimination, Thus Supporting Congress' Reauthorization of Section 5

Since the Voting Rights Act was first enacted, Asian Americans have made some gains in electoral representation. According to a 2005 study, approximately seventy-five percent (75%) "of Asian American elected officials were from jurisdictions covered by Section 203 provisions or in combination with other provisions," including Section 5 of the Voting Rights Act. *See* Carol Hardy-Fanta, Christine Marie Sierra, Pei-te Lien, Dianne M. Pinderhughes, Wartyna L. Davis, Race Gender and Descriptive Representation: An Exploratory View of Multicultural Elected Leadership in the United States, September 4, 2005, at 17, available at http://www.gmcl.org/pdf/APSA9-05-05.pdf (last visited Mar. 20, 2009). However, in reauthorizing Section 5, Congress also found that the number of Asian Americans elected to office "has failed to keep pace with [the]

population growth" of that community. H.R. Rep. No. 109-478, at 33.[4]

While some progress has undeniably been made, Asian Americans still face overt racial discrimination at the polls when attempting to exercise their right to vote, such as hostile and unwelcoming poll workers, as well as outright challenges to their right to vote based on race. Moreover, societal discrimination and the misperception of Asian Americans as perpetual foreigners and immigrants, coupled with historical *de jure* racism against Asian Americans, only reinforce the need to safeguard the voting rights of this minority group. *See generally* Frank Wu, Yellow: Race in American Beyond Black and White (Basic Books 2001).

Because Asian Americans bear the discrimination and misperceptions directed at them when they enter the poll sites, Section 5 is necessary to ensure that their voting rights are fully protected. Notably, this Court set forth in *Thornburg v. Gingles* that "typical factors" probative of a violation under the non-discrimination provisions of the Voting Rights Act include (1) "the extent to which the members of the minority group in the state or political subdivision bear the effects of discrimination in

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[4] "For example, the number of Asian American elected officials has increased from 120 in 1978 to 346 in 2004. However, as of 2004, there were twelve million Asian Americans residing in the United States compared to the 1.2 million Asian Americans who resided in 1970." *Id.* at 33-34.

such areas as education, employment and health, which hinder their ability to participate effectively in the political process" and (2) "whether political campaigns have been characterized by overt or subtle racial appeals." 478 U.S. 30, 36-37 (1986). Thus, facts probative of a violation under those provisions are relevant to, and inform the analysis under, the Section 5 enforcement provisions.

Discrimination against American citizens of Asian ancestry carries grave societal consequences, compelling Asian Americans to continue "bear[ing] the effects of discrimination" that "hinder their ability to participate effectively in the political process." *Id.* at 37. It also reinforces negative stereotypes about the group and may ultimately encourage hate crimes and racial violence, as well as facilitate the adoption of anti-immigrant laws and policies.

Renewed anti-immigrant sentiment – some of it directed at American citizens of Asian ancestry – also re-emphasizes the need to protect the voting rights of this minority group through Section 5. *See* Views on the 2006 Reauthorization of the Voting Rights Act: When the Voting Rights Act Became Un-American: The Misguided Vilification of Section 203, 58 Ala. L. Rev. 377, 382 (2006). In particular, Asian Americans are perceived as perpetual foreigners or immigrants and not "American," regardless of their true status. *See, e.g.*, Keith Aoki, "Foreignness" & Asian American Identities: Yellowface, World

War II Propaganda, and Bifurcated Racial Stereotypes, 4 Asian Pac. Am. L.J. 1, 9-13 (1996).

History is replete with examples of discrimination and anti-immigrant sentiment directed towards Asian Americans. For example, legislative efforts have limited the Asian American community's access to this country's borders. *See, e.g.*, Philippine Independence Act of 1934, ch. 84, 48 Stat. 456, 462 (imposing annual quota of fifty Filipino immigrants; amended 1946); Immigration Act of 1924, ch. 190, 43 Stat. 153 (denying entry to virtually all Asians; repealed 1952); Immigration Act of 1917, ch. 29, 39 Stat. 874, 874-98 (banning immigration from almost all countries in the Asia-Pacific region; repealed 1952); Scott Act of 1888, ch. 1064, 1, 25 Stat. 504, 504 (rendering 20,000 Chinese re-entry certificates null and void); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61 (prohibiting immigration of Chinese laborers; repealed 1943); Naturalization Act of 1790, ch. 3, 1 Stat. 103 (providing one of the first laws to limit naturalization to aliens who were "free white persons" and thus, in effect, excluding African-Americans, and later, Asian Americans; repealed 1795).

Asian Americans have also suffered from a long history of *de jure* discrimination. *See, e.g.*, *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding Alien Land Laws that effectively precluded Asians from owning land); *Ozawa v. United States*, 260 U.S. 178 (1922) (holding that Japanese are ineligible for naturalized

citizenship); Cable Act of 1922, ch. 411, 46 Stat. 1021, 1021-1022 (mandating that any American female citizen who marries "an alien ineligible to citizenship" would lose her own citizenship); Exec. Order No. 589 (Mar. 14, 1907) (prohibiting Japanese and Korean citizens with passports issued by the Government of Japan to go to Hawaii, Mexico, or Canada to re-emigrate to the U.S.; repealed by Exec. Order No. 10009, 13 Fed. Reg. 6104 (Oct. 18, 1948)); Cal. Civ. Code § 60 (1905) (prohibiting issuing of licenses for marriages between whites and "Mongolians"); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (considering whether an American-born person of Chinese ancestry could be denied U.S. citizenship and excluded from the country); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (upholding constitutionality of the Geary Act of 1892, ch. 60, 4, 27 Stat. 25, which renewed the exclusion of Chinese laborers for another ten years and required all Chinese to register); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (upholding constitutionality of Chinese exclusion laws); Cal. Const. of 1879, art. XIX, § 2 (excluding Chinese immigrants from sectors such as corporations and public works); *In re Ah Yup*, 1 F. Cas. 223 (C.C. Cal. 1878) (holding that a native of China is not entitled to become a citizen of the United States); Chinese Police Tax of 1862, ch. 339, 1862 Cal. Stat. 462 (requiring Chinese mine workers to pay a police tax; repealed 1939); *People v. Hall*, 4 Cal. 399 (Sup. Ct. 1854) (establishing that Chinese-Americans and Chinese immigrants had no rights to testify against white persons in court).

Asian Americans further "bear the effects of discrimination in such areas as education [and] employment." *Gingles*, 478 U.S. at 36-37. *See, e.g.*, *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that the lack of educational services in Chinese effectively denied Chinese students equal educational opportunities on the basis of their ethnicity in violation of Title VI of the Civil Rights Act of 1964); Stacey J. Lee & Kevin K. Kumashiro, Nat'l Educ. Assoc., A Report on the Status of Asian Americans and Pacific Islanders in Education: Beyond the "Model Minority" Stereotype (2005) (discussing education discrimination faced by Asian Americans); Vanessa Leung, The Coalition for Asian Am. Children and Families, Hidden in Plain View: An Overview of the Needs of Asian Am. Students in the Public School System 18 (2004) (same; citing Bd. of Educ. of the City of New York, Office of English Language Learners, Facts & Figures 2000-2001); Fed. Glass Ceiling Comm'n, Good for Business: Making Full Use of the Nation's Human Capital (1995) (discussing employment discrimination faced by Asian Americans, among other groups). This discrimination in education and employment negatively affects the ability of Asian Americans to fully exercise their right to vote. *Cf. White v. Regester*, 412 U.S. 755, 765-70 (1973) (holding that disestablishment of the multi-member districts in certain counties was warranted in light of the history of political discrimination against African-Americans and Mexican-Americans residing in those counties and the residual effects of such discrimination upon those groups).

Perhaps one of the most poignant examples of anti-Asian discrimination was the internment of approximately 120,000 Americans of Japanese ancestry during World War II without the right to notice of charges, the right to attorneys, or the right to a trial. *See* Exec. Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (authorizing the internment); *see also Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment under strict scrutiny review). White immigrant groups whose home countries were also at war with the United States were not similarly detained because they did not seem as "foreign" as the Japanese, in that they did not threaten the existence of a white national identity or its security. *See* Terri Yuh-lin Chen, Hate Violence as Border Patrol: An Asian American Theory of Hate Violence, 7 Asian L.J. 69, 80 (2000).

Most recently, after the attacks of September 11, 2001, people of South Asian descent have become targets of countless hate crimes and incidents of racial profiling across the country. *See, e.g.*, Darryl Fears, "Hate Crimes Against Arabs Surge, FBI Finds," Wash. Post (Nov. 26, 2002), at A2 (noting that the FBI recorded 481 post-9/11 attacks against, among others, South Asian Sikhs, representing over a 1,500 percentage increase in hate crimes). Here, too, courts are noting that, "[s]ince the terrorist attacks of September 11, 2001, this country has struggled to meet the stringent demands of national security and, simultaneously, to protect the civil rights of the American people." *Alshrafi*

v. Am. Airlines Inc., 321 F. Supp. 2d 150, 152 (D. Mass. 2004).

Anti-Asian discrimination resonates with segments of society ready to take action to defend their way of life from being destroyed by "foreigners." Indeed, numerous hate crimes have been directed against Asian Americans either because of their minority group status or because they are perceived as unwanted immigrants. *See, e.g.*, "Girl's Bloody Beating; Driver Does Nothing As Teens Attack Her On Bus," N.Y. Post (Mar. 18, 2007) (a female Asian American Catholic high school student was brutally punched, kicked, and teased for looking "Chinese" by a gang of youths while riding a city bus home from school); "Arsonist Avoids Jail In Church Van Blaze," N.Y. Daily News (Aug. 5, 2004) (a man was charged with allegedly setting fire to a van bearing Korean lettering because he hated Asian immigrants); "3 Indians Attacked on Street And the Police Call It Bias," N.Y. Times (Aug. 6, 2003) (three white men allegedly attacked three Sikhs while yelling "Bin Laden family! Go back to your country!").

In a national poll of legal immigrants from Latin America, Asia, Africa, and Europe, who numbered around 14 million Americans in 2006, a majority felt the anti-immigrant sentiment was growing in America and that anti-immigrant sentiment had detrimentally affected their families. *See* New America Media, Legal Immigrants: A Voice of Reason in the Immigration Debate 3 (2006), available at http://

media.newamericamedia.org/images/polls/imm_poll/Immigration_exec_summary.pdf (last visited Mar. 20, 2009). Indeed, AALDEF's multilingual exit poll in 2006 also found that thirty percent (30%) of respondents said that they or members of their family had been affected by anti-immigrant sentiment either at work, at school, or in public locations. *See* AALDEF, The Asian American Vote in the 2006 Midterm Elections: NY, NJ, MA, MI, PA, MD, VA, IL, WA, DC 12 (2007), available at http://www.aaldef.org/docs/AALDEF2006ExitPollReportMay2007.pdf (last visited Mar. 20, 2009).

It is difficult to imagine that the stigma, stereotyping, and bias that American citizens of Asian ancestry endure in society would cease to exist once they enter the poll site to vote. Indeed, political campaigns have resorted to "overt or subtle racial appeals" in an effort to affect electoral outcomes. *Gingles*, 478 U.S. at 37. Specifically, they have used xenophobic tactics to marginalize and stereotype Asian Americans as foreigners. Asian Americans make easy targets in political campaigns because they are clothed with the label of "immigrant" or "foreigner" simply by their appearance. Such actions are undeniably probative of potential violations under the Voting Rights Act.

For example, in the 2004 primary elections in Bayou LaBatre, Alabama (a Section 5 covered jurisdiction), supporters of a white incumbent running against a Vietnamese-American candidate made a concerted effort to intimidate

Asian American voters. The supporters challenged Asian Americans at the polls, falsely accusing them of not being U.S. citizens or city residents, or of having felony convictions. *See* H.R. Rep. No. 109-478, at 45 ("In Alabama, Asian American voters attempting to vote in an election with an Asian American candidate were harassed and threatened by supporters of an opposing candidate in polling locations in Bayou La Batre."). The challenged voters had to complete a paper ballot and have that ballot vouched for by a registered voter. The DOJ investigated the allegations and found them to be racially motivated. *See id.*; *see also* DOJ Press Release, "Justice Department to Monitor Elections in New York, Washington, and Alabama" (Sept. 13, 2004) ("In Bayou La Batre, Alabama, the Department will monitor the treatment of Vietnamese-American voters."), available at http://www.usdoj.gov/opa/pr/2004/September/04_crt_615.htm (last visited Mar. 20, 2009). As a result, the challengers were prohibited from interfering in the general election, and the city, for the first time, elected an Asian American to the City Council. *See* DeWayne Wickham, "Why Renew Voting Rights Act? Ala. Town Provides Answer," USA Today (Feb. 22, 2006).[5]

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[5] Counsel notes that the Governor of Alabama has submitted an *amicus* brief in support of neither party, in which he relates the purported progress in his state with regards to African-Americans. Nowhere in that brief does he address the incident described above or any advances made with respect to Asian Americans.

Additionally, in the 2004 U.S. Senate race in Virginia (a Section 5 covered jurisdiction), incumbent George Allen, at a campaign rally in southwest Virginia, repeatedly called a South Asian volunteer for the Democrat challenger a "macaca" – a racial epithet used to describe Arabs or North Africans, which literally means "monkey" – and then began talking about the "war on terror." *See* "Allen Quip Provokes Outrage, Apology," Wash. Post (Aug. 15, 2006).

These incidents of discrimination and racism can penetrate into the voting booth where the perception that American citizens of Asian ancestry are foreigners or immigrants has the real effect of denying them full participation in the electoral process. For example, in 2004 in New York, poll workers racially profiled Asian American voters and required them to provide naturalization certificates before they could vote. At another poll site, a police officer required all Asian American voters to show photo identification before they could vote. Photo identification is not required to vote in New York elections, but if voters could not produce such identification, the officer turned them away from the polls and told them to go home. *See* Continuing Need for Section 203's Provisions for Limited English Proficient Voters, Hearing Before the House Judiciary Comm., 109th Cong. 37 (2006) (testimony of Margaret Fung, AALDEF, Exec. Dir.); Letter from G. Magpantay, AALDEF Staff Attorney to J. Ravitz, Exec. Dir., New York City Bd. of Elections (June 16, 2005) (submitted

to Congress with AALDEF Report and on file with counsel).

The overt racial appeals and discrimination during the course of political campaigns and elections impinge upon the ability of Asian Americans to freely and fully exercise their right to vote because they compel Asian Americans to "bear the effects of discrimination" and "hinder their ability to participate effectively in the political process." *Gingles*, 478 U.S. at 37. They have created an environment of fear and resentment towards Asian Americans, many of whom are perceived as foreigners based on their physical attributes. This perception, coupled with the growing sentiment that foreigners are destroying or injuring the country, jeopardizes Asian Americans' ability to exercise their right to vote free of harassment and discrimination.

In sum, Section 5 has proven to be an effective tool in protecting Asian American voters against a host of actions that threatened to curtail their voting rights. In particular, American citizens of Asian ancestry have been targeted as foreigners and unwanted immigrants. These perceptions have real consequences for the ability of Asian Americans to fully participate in the electoral and political process. Congress properly reauthorized Section 5 after a deliberative fact-finding process and with awareness of the important functions that it serves for minority communities.

CONCLUSION

For the foregoing reasons and the reasons presented by Appellee and Intervenor-Appellees, the judgment of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATEMENTS OF INTEREST OF *AMICI*

American Citizens for Justice

The American Citizens for Justice (ACJ) is a nonprofit organization dedicated to serving the Asian Pacific American communities of Metro Detroit, Michigan, and the Midwest and to advocate for the civil rights of all Americans. ACJ conducted poll monitoring/exit polling during the 2008 election.

Asian American Bar Association of Greater Chicago

The Asian American Bar Association of the Greater Chicago Area (AABA) serves not only the interests of its members, but also the community from which many of its members came. AABA has continually reaffirmed its commitment to that belief and has grown to more than 400 members and associates. From increasing awareness among elected officials on issues of importance to the Asian American community, to documenting the need for increased representation in all areas of the profession including the judiciary, to serving the legal needs of the community by supporting non-for-profit organizations, AABA has strived to serve Chicagoland's Asian American attorneys and community. AABA conducted poll monitoring/exit polling during the 2008 election.

Asian American Bar Association of New York

The Asian American Bar Association of New York (AABANY) is a membership organization of attorneys, judges, law professors, legal professionals, legal assistants or paralegals, and law students concerned with issues affecting the Asian Pacific American community. AABANY works to advocate for the Asian Pacific American community and seeks to improve the study and practice of law, and the fair administration of justice for all by ensuring the meaningful participation of Asian Americans in the legal profession. AABANY is the regional affiliate of the National Asian Pacific American Bar Association. AABANY conducted poll monitoring/exit polling during the 2008 election.

Asian American Lawyers Association of Massachusetts

The Asian American Lawyers Association of Massachusetts is a non-partisan, non-profit organization of over two hundred Asian American lawyers, judges, law professors, and law students. AALAM's mission is to promote and enhance the Asian American legal profession by furthering and encouraging professional interaction and the exchange of ideas among its members and with other individuals, groups, and organizations. AALAM also strives to improve and facilitate the administration of law and justice. AALAM is a member organization of the National Asian Pacific American Bar Association. AALAM

conducted poll monitoring/exit polling during the 2008 election.

Asian American LEAD

AALEAD's overarching goal is to increase the opportunities and ability of low-income Asian American children to move out of poverty and become successful, self-sufficient adults. AALEAD firmly believes that education is the key to meeting this goal. However, AALEAD understands that children need additional family, school, and personal supports, not just academic assistance, to succeed. Consequently, AALEAD uses a five-pronged approach to youth development, offering each child after school intervention in a safe space, mentoring, family support and educational advocacy. AALEAD conducted poll monitoring/exit polling during the 2008 election.

Asian American Society of Central Virginia

Asian American Society of Central Virginia (AASoCV), a non-profit charitable organization 501(c)(3) established in 1998, strives to represent the concerns of over 30,000 Asian Americans who live in Central Virginia. AASoCV's goal is to promote unity, harmony and diversity in Central Virginia. AASoCV conducted poll monitoring/exit polling during the 2008 election.

Asian Community Development Corporation of Boston

The Asian Community Development Corporation, a community-based organization, is committed to high standards of performance and integrity in serving the Asian American community of Greater Boston, with an emphasis on preserving and revitalizing Boston's Chinatown. The Corporation develops physical community assets, including affordable housing for rental and ownership; promotes economic development; fosters leadership development; builds capacity within the community; and advocates on behalf of the community. The Corporation conducted poll monitoring/exit polling during the 2008 election.

Asian Pacific American Agenda Coalition

The Asian Pacific American Agenda Coalition is a coalition of organizations and individuals who have come together to identify and to move forward a common agenda that addresses the needs of the Asian Pacific American communities in Massachusetts. Their mission is to promote and foster the development of Asian Pacific Americans and to ensure their full and equal participation in the social, economic, and political lives of their communities. The Asian Pacific American Agenda Coalition conducted poll monitoring/exit polling during the 2008 election.

Asian Pacific American Bar Association of the Greater Washington, DC Area

The Asian Pacific American Bar Association of the Greater Washington, DC Area is an organization of attorneys, judges, law professors, law students, and other legal professionals dedicated to the advancement of Asian Pacific Americans. APABA-DC is the oldest and largest association of Asian Pacific American attorneys in the Washington, DC area. APABA-DC is an affiliate chapter of the National Asian Pacific American Bar Association. APABA-DC conducted poll monitoring/exit polling during the 2008 election.

Asian Pacific American Bar Association of Pennsylvania

The Asian Pacific American Bar Association of Pennsylvania is a non-profit organization founded in 1984 to serve a wide network of Asian Pacific American attorneys admitted or practicing in Pennsylvania, Northern Delaware and Southern New Jersey. The APABA-PA is dedicated to the advancement of its members and the Asian American Community. APABA-PA also educates its members about issues critical to Asian Pacific Americans and advances the interests of Asian Pacific American attorneys as well as the interests of the local community. APABA-PA has previously worked with AALDEF in monitoring elections and in conducting its exit poll of Asian American voters.

APABA-PA conducted poll monitoring/exit polling during the 2008 election.

Asian Pacific American Labor Alliance

The Asian Pacific American Labor Alliance (APALA), AFL-CIO, is the first and only national organization of Asian Pacific American (APA) union members. Over 600,000 APA workers have joined unions and are seeking better pay, improved benefits, dignity on the job, and a voice in the workplace. Backed with strong support of the AFL-CIO, APALA has 11 chapters and pre-chapters and a national office in Washington, D.C. In 2006, APALA educated, registered, and mobilized voters in Nevada, Michigan, Washington, California, Hawaii, District of Columbia, Maryland, and Texas. APALA was again active in 2008 with educating, registering, and mobilizing voters, including conducting poll monitoring/exit polling during the 2008 election.

Asian Pacific American Legal Resource Center

The Asian Pacific American Legal Resource Center (APALRC) is the Capital Region's nonprofit advocate advancing the legal and civil rights of Asian Pacific Americans through direct services, education, and advocacy. The APALRC serves the individual legal needs of low-income and limited-English proficient Asian Pacific Americans and advocates for broad-based systemic change on legal and civil rights issues impacting Asian Pacific Americans. APALRC is committed to ensuring that Asian Pacific

Americans are able to vote, unencumbered by barriers including language access and inaccessible poll sites. APALRC has conducted poll monitoring and exit polling in Virginia during the 2004 election and in Virginia, Washington DC, and Maryland during the 2006 and 2008 elections. Through APALRC's poll watching and exit polling, APALRC has documented the difficulties that place unwarranted burdens upon Asian Pacific American voters. APALRC thus supports ensuring the right to vote of Asian Pacific Americans through Section 5 of the Voting Rights Act.

Asian Pacific Islander American Vote

Asian and Pacific Islander American Vote (APIAVote) is a national nonpartisan, nonprofit organization that encourages and promotes civic participation of Asian Pacific Islander Americans in the electoral and public policy processes at the national, state and local levels. APIAVote envisions a society in which all Asian Pacific Islander Americans fully participate in and have access to the democratic process. APIAVote conducted poll monitoring/exit polling during the 2008 election.

Cambodian Association of Greater Philadelphia

The Cambodian Association of Greater Philadelphia, Inc. seeks to improve the quality of life of Cambodian Americans within the greater Philadelphia area through direct services,

advocacy, and cultural awareness. Since its inception, CAGP has developed and implemented many social, educational, and cultural programs helping Cambodian American families become self-sufficient. CAGP conducted poll monitoring/exit polling during the 2006 and 2008 elections.

Chinese American Voters Association

The Chinese American Voters Association (CAVA) is a non-profit organization established to advance the political awareness and voter education of Chinese Americans in New York. CAVA has sponsored numerous events and provided community services such as voter education literature, publication of newsletters, voter registration drives, political forums, polling site assistance, and other voter education programs. CAVA conducted poll monitoring/exit polling during the 2008 election.

Chinese Progressive Association

The Chinese Progressive Association is a grassroots community organization working for full equality and empowerment of the Chinese community in the Greater Boston area. CPA seeks to address the issues affecting Chinese Americans from improving the living and working conditions to increasing political empowerment and voter education within the community. CPA conducted poll monitoring/exit polling during the 2008 election.

Coalition of Asian Pacific Americans of Virginia

The Coalition of Asian Pacific Americans of Virginia aims to unify the Asian and Pacific Islander community to have an organized voice throughout the Commonwealth of Virginia. They seek to promote active participation of Asian and Pacific Americans in the policy arena and support community-organizing efforts. CAPAVA also supports and defends equal rights and opportunities for all Asian and Pacific Americans. CAPAVA preserves the voting rights of all Asian Americans by participating in poll monitoring/exit polling during elections. CAPAVA conducted poll monitoring/exit polling during the 2008 election.

Filipino American Human Services, Inc.

FAHSI is a community-based, non-profit organization dedicated to improving the social conditions and enhancing the self-reliance of the Filipino and Filipino American communities of New York City. FAHSI's vision is an empowered Filipino American community with a strong sense of identity and commitment to civic participation. FAHSI serves marginalized segments of the community, particularly the elderly, youth, women and recent immigrants. FAHSI assisted in conducting poll monitoring/exit polling during the 2006 and 2008 elections.

Korean American League for Civic Action

The Korean American League for Civic Action is a leading non-partisan, advocacy organization dedicated to promoting the civic

participation of Korean Americans and Asian Pacific Americans in New York. KALCA aims to improve civil society and American democracy with a more engaged electorate and they work to encourage greater participation by the Korean American and Asian Pacific American communities with community outreach, voter education, and voter registration drives. KALCA has conducted poll monitoring/exit polling in New York and New Jersey for the past several elections, including the 2008 election.

Korean American Resource & Cultural Center

Korean American Resource & Cultural Center, the Chicago affiliate of the National Korean American Service & Education Consortium, aims to empower the Korean American community through education, social service, organizing/advocacy and culture. Serving the Korean American community of greater Chicago, the organization strives to resolve issues facing the growing Korean American community. KRCC has conducted poll monitoring/exit polling for the past several elections, including the 2008 election.

Korean American Voters' Council of NY & NJ

The Korean American Voters' Council of New York & New Jersey is a coalition of organizations and individuals working to create greater civic participation in the Korean American community. KAVC conducted voter registration drives, translated and published

voters' handbooks, and held seminars about political candidates and issues. KAVC has also operated voter hotlines in Korean and assisted voters at poll sites. KAVC has conducted poll monitoring/exit polling for the past several elections, including the 2008 election.

Korean Community Service Center of Greater Washington, DC

KCSC's mission is to assist and empower Asian Americans and new immigrants to become well-adjusted and fully contributing members of the United States through social services, education, advocacy, and development of resources. KCSC conducted poll monitoring/exit polling during the 2008 election.

Maryland Vietnamese Mutual Association

MVMA's mission is to serve, support, and advance the Vietnamese American community. While MVMA's special commitment is to advocate for the cause of Vietnamese Americans, it serves all immigrant communities. MVMA's vision is to build a strong, unified, and caring Vietnamese American community, where young people, adults and elders are engaged and contributing citizens through continuing educational, social and economic advancement, while maintaining their cultural heritage. MVMA is involved with educating and mobilizing voters in the Vietnamese community especially those with language access needs. MVMA conducted poll monitoring/exit polling during the 2008 election.

MassVOTE

MassVOTE (The Massachusetts Voter Education Network) is a non-partisan voting rights organization whose urban voter mobilization model works with non-profit organizations to increase voter education and turnout. In addition, MassVOTE's electoral reform agenda seeks to eliminate voter participation barriers, especially among communities of color, language minorities, low income, youth, new Americans and the disabled. MassVote conducted poll monitoring/exit polling during the 2008 election.

Muslim Bar Association of New York

The Muslim Bar Association of New York (MuBANY) is a member-based professional association serving the educational, professional, and social needs of Muslim lawyers, legal professionals and law students living and working in the New York metropolitan area. In 2008, MuBANY members participated in voter registration and election protection efforts focused on Muslim voters, many of whom are Asian Americans, including poll monitoring/exit polling.

National Asian Pacific American Women's Forum

NAPAWF is the only national, multi-issue APA women's organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for APA women and girls. NAPAWF has been actively involved in registering, educating, and mobilizing

voters over the years, including poll monitoring/exit polling during the 2008 election.

National Korean American Service & Education Consortium

The National Korean American Service & Education Consortium is a national non-profit organization based in Los Angeles, California with a Washington DC office. NAKASEC affiliates are the Korean American Resource & Cultural Center in Chicago and the Korean Resource Center in Los Angeles. Founded in 1994, NAKASEC is a multi-issue civil rights and human rights organization based in the Korean American community. NAKASEC's mission is to project a national progressive voice for Koreans Americans and promote their full participation in the United States. To this end, NAKASEC promotes equitable and just changes to the political and legislative systems through a combination of education and policy advocacy with grassroots organizing and community mobilization. NAKASEC conducted poll monitoring/exit polling during the 2008 election.

North American South Asian Bar Association

The North American South Asian Bar Association (NASABA) is the umbrella organization for 26 regional bar associations in North America representing the interests of over 6,000 attorneys of South Asian descent. Within the United States, NASABA takes an active interest in the legal rights of South Asian and

other minority communities, including voting rights. NASABA conducted poll monitoring/exit polling during the 2008 election.

OCA

Originally founded as the Organization of Chinese Americans, OCA is a national organization dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans in the United States. With over 80 chapters and affiliates across the nation, OCA's aims are to advocate for social justice, to promote civic participation, to advance coalitions and community building, and to foster cultural heritage. OCA monitors issues and policies that affect the Asian Pacific American community. OCA and/or its chapters have conducted poll monitoring/exit polling during the 2002, 2004, 2006, and 2008 elections.

ONE Lowell

ONE Lowell is a non-profit organization in Lowell, Massachusetts that has been dedicated to increasing the integration and self-sufficiency of Lowell's immigrant populations by strengthening civic participation, developing strong leadership and increasing access to vital services. ONE Lowell works with immigrant communities to register qualified voters and increase awareness about the traditions of democracy in America. The organization also works with local, state and national organizations to increase awareness about policies and legislation that affect the

immigrant populations. ONE Lowell has conducted poll monitoring/exit polling for the past several elections, including the 2008 election.

One Nevada

One Nevada is a nonpartisan coalition that works in partnership with APALA and APIAVote to register new voters and organize get-out-the-vote campaigns by encouraging early voting, phone banking infrequent registered Asian American Pacific Islanders (AAPI) voters, and canvassing highly concentrated AAPI neighborhoods to increase the AAPI vote. One Nevada conducted poll monitoring/exit polling during the 2008 election.

Philadelphia Chinatown Development Corporation

PCDC is a grassroots, non-profit, community-based organization. Our mission is to preserve, protect, and promote Chinatown as a viable ethnic, residential, and business community in Philadelphia, Pennsylvania. PCDC conducted poll monitoring/exit polling during the 2006 and 2008 elections.

Providence Youth and Student Movement

Providence Youth and Student Movement is a local grassroots organization that works to with Southeast Asian American youth and families to confront and end state, street, and interpersonal violence in Providence, Rhode Island. Through programs, campaigns, and

community building, PrYSM focuses on civil rights and social issues that affect immigrant youth. PrYSM conducted poll monitoring/exit polling during the 2004 and 2008 elections.

The Sikh Coalition

The Sikh Coalition works to defend civil rights and liberties for all people, promote community empowerment and civic engagement within the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias and discrimination, and educate the broader community about Sikhsim order to promote cultural understanding and create bridges across communities. Ensuring that Sikhs have free access to the polls is fundamental to this mission. The Sikh Coalition believes that any attempt to suppress the right to vote is contrary to the laws and traditions of the United States. The Sikh Coalition conducted poll monitoring/exit polling during the 2004, 2006, and 2008 elections.

South Asian Americans Leading Together

South Asian Americans Leading Together (SAALT) is a national, non-profit organization dedicated to ensuring the full and equal participation by South Asians in the civic and political life of the United States. SAALT works to unify the South Asian community in America and provide a voice on issues affecting South Asians that relate to equality and civil rights. SAALT coordinates the National Coalition of

South Asian Organizations (NCSO), a national network of 36 organizations based in 12 regions around the country. SAALT conducted poll monitoring/exit polling during the 2004, 2005, 2006, and 2008 elections.

South Asian Bar Association of Michigan

The South Asian Bar Association of Michigan is a voluntary bar association dedicated to the needs, concerns, and interests of the South Asian American legal community in the Michigan area. The South Asian Bar Association of Michigan conducted poll monitoring/exit polling during the 2008 election.

South Asian Bar Association of New York

The South Asian Bar Association of New York (SABANY) is an organization of South Asian attorneys practicing in the New York Metropolitan region. SABANY is a voluntary bar association dedicated to the needs, concerns, and interests of lawyers of South Asian heritage. SABANY is dedicated to ensuring the civil liberties of the South Asian community in New York, by acting as a conduit between the South Asian community and legal services and educational programs in the area. In addition, they are committed to promoting the professional development of the South Asian legal community through networking, advocacy and mentoring. It is SABANY's goal to educate South Asian Americans about the legal system and to encourage more participation by the community

in the legal profession. SABANY conducted poll monitoring/exit polling during the 2008 election.

South Asian Youth Action!

The South Asian Youth Action! (SAYA!) is a community organization working to promote leadership and encourage the success of South Asian youth in the New York City area. SAYA! recognizes the importance of creating opportunities for South Asian youth and works to resolve the social issues that affect the South Asian community in a post-9/11 society. Through its programs and advocacy efforts SAYA! works to create broad social and systematic changes that positively impact immigrant youth. SAYA! has conducted election poll monitoring/exit polling for the past several elections, including the 2008 election.

Vietnamese American Initiative for Development

Vietnamese American Initiative for Development (VietAID) is a local organization dedicated to empowering the Vietnamese Community of the Boston metropolitan area through civic participation and community development. In preparation for the 2000 elections, VietAID conducted voter registration drives and mobilized voters, which lead to an increased voter turnout by 47% in the Vietnamese American community.

Vietnamese American Young Leaders Association of New Orleans

The Vietnamese American Young Leaders Association of New Orleans (VAYLA-NO) is a youth-led, youth organizing and development, community-based organization in New Orleans dedicated to the empowerment of Vietnamese American and underrepresented youth through services, cultural enrichment, and social change. VAYLA-NO conducted poll monitoring/exit polling during the 2008 election.

YKASEC – Empowering the Korean American Community

YKASEC – Empowering the Korean American Community was established to meet the needs and concerns of the Korean American Community through education, civic participation immigrant rights, social services, and culture in New York. YKASEC works with various grassroots organizations on immigration policy and voter rights. YKASEC – Empowering the Korean American Community has conducted election poll monitoring/exit polling for the past several elections, including the 2008 election.

AMICUS CURIAE BRIEF

No. 08-322

IN THE
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE
Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

Named for late Associate Justice William J. Brennan, Jr., the Brennan Center for Justice at NYU School of Law is a not-for-profit, nonpartisan public-policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full and equal political participation and to ensure that public policy and institutions reflect the diverse voices and interests that make for a rich and energetic democracy. The Brennan Center has focused extensively on protecting minority voting rights, including by authoring a report on minority representation and reports on other issues relating to voting rights; launching a major, multi-year initiative on redistricting; and participating as counsel or *amicus* in a number of federal and state cases involving voting and election issues.

In order to ensure that Congress retains its full powers to enforce the guarantees of the Fifteenth Amendment, the Brennan Center participated as *amicus curiae* in the summary-judgment proceedings before the district court in this case. In granting summary judgment to the government and intervenors and upholding the constitutionality of

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

Section 5 of the Voting Rights Act, the district court cited with approval the Brennan Center's argument that "'while the Supreme Court has found some statutes were not an appropriate means of enforcing the *Fourteenth Amendment,* the Court has been far more deferential when Congress's *Fifteenth Amendment* powers are at stake.'" *Northwest Austin Mun. Util. Dist. No. One* ("*NAMUDNO*") *v. Mukasey*, 573 F. Supp. 2d 221, 236 (D.D.C. 2008) (quoting Brennan Center *amicus* brief). On appeal, the Brennan Center again submits a brief as *amicus curiae* in support of Appellees and in support of affirmance. In this brief, the Brennan Center addresses the history of the Fifteenth Amendment, which supports the district court's conclusion.

SUMMARY OF ARGUMENT

The history of the Fifteenth Amendment confirms that its framers intended to give Congress broad authority to protect the fundamental right to vote from racial discrimination and fully justifies the special deference this Court has consistently given to Congress's judgments in exercising that authority.

Before passing the Fifteenth Amendment, Congress had extended black enfranchisement as far as it could through ordinary legislation. Although Congress had succeeded in formally enfranchising blacks throughout the former Confederacy and federally controlled territories by the end of 1868, those legal rights were already being undermined by violence and intimidation. The Fifteenth Amendment was intended to consolidate the formal gains that had been previously achieved and ensure

that they were not rolled back by circumvention or by future electoral majorities. At the same time, the enforcement clause of the Fifteenth Amendment was designed to provide Congress with continuing authority to protect black voting rights after it ceded supervisory control over the former Confederacy.

Both Congress and the states recognized that the Fifteenth Amendment represented a fundamental structural change in at least three ways. First, the Amendment enshrined the right to vote as a right of paramount importance to achieving racial equality. Second, the Amendment transferred to the federal government control over an area that had once been left exclusively to the states. And, third, the Amendment provided that Congress would play an ongoing role in protecting the new federal right the Amendment had created. Immediately after the Amendment was ratified, Congress passed a series of vigorous enforcement acts, reflecting the contemporary understanding that the Fifteenth Amendment entrusted to Congress primary responsibility for protecting against racial discrimination in voting and vested Congress with all the powers necessary for accomplishing that task.

In its early decisions examining Congress's enforcement powers, the Supreme Court also recognized that the Fifteenth Amendment represented a major transfer of authority from the states to the federal government and gave Congress broad authority to protect against racial discrimination in voting. Indeed, when Congress passed the Voting Rights Act in 1965, the Senate and House Reports noted that "[n]o statute confined to

enforcing the 15th amendment exemption from racial discrimination in voting has ever been voided by the Supreme Court." S. Rep. No. 89-162, at 17 (1965); H.R. Rep. No. 89-439, at 17 (1965). That observation remains true to this day.

The history and structure of the Fifteenth Amendment demonstrate that Congress's decision to extend the temporary provisions of the Voting Rights Act should be accorded special deference. Section 5 of the Voting Rights Act (both as originally enacted and as reenacted) addresses the same concerns that animated the framers of the Fifteenth Amendment. Congress, which is entrusted with critical responsibility for enforcing the Fifteenth Amendment, has once again determined, based on an extensive record, that the protections of Section 5 are necessary to prevent hard-won gains in voting rights from being eroded or undermined. This Court should defer to that legislative judgment and reject NAMUDNO's constitutional challenge.

ARGUMENT

I. The Fifteenth Amendment Was Enacted to Prevent Recent Gains in Enfranchisement From Being Eroded by Southern Resistance or Future Electoral Rollbacks.

Congress passed the Fifteenth Amendment immediately after the 1868 elections at the end of a two-year period in which it had expanded black enfranchisement as far as possible through ordinary legislation. Congress viewed the recent gains in black enfranchisement as fragile and tenuous. Because it was uncertain whether the Fourteenth

Amendment would fully protect such rights, Congress believed that only another amendment establishing robust federal authority could safeguard against racial discrimination in voting and preserve Congress's role in protecting enfranchisement as the former Confederate states were re-assimilated into the Union. Section 1 of the Amendment instituted a self-executing nation-wide ban on racial discrimination in voting. And Section 2 of the Amendment provided Congress with additional power to enforce the Amendment through "appropriate legislation." U.S. Const. amend. XV, § 2.

A. Before Passing the Fifteenth Amendment, Congress Enacted Aggressive Statutes Regulating the Franchise in Federally Controlled Areas.

At the beginning of 1867, a mere two years before Congress passed the Fifteenth Amendment, and just three years before the Amendment cleared the threshold of state ratifications, federal law did not guarantee the voting rights of any black persons. Congress enacted a series of aggressive statutes in 1867 and 1868 designed to extend black male enfranchisement as far as Republicans believed possible without another constitutional amendment—namely, in territories over which Congress had plenary control and in the former states of the Confederacy under Reconstruction.

Congress also provided mechanisms to enforce this right.[2]

Congress first passed legislation enfranchising blacks in the District of Columbia. *See* An Act to Regulate the Elective Franchise in the District of Columbia, ch. 6, 14 Stat. 375 (1867).[3] Enfranchisement alone was revolutionary enough. *See* Cong. Globe, 39th Cong., 2d Sess. 107 (1866) (statement of Sen. Sumner) ("Here in the District of Columbia we begin the real work of reconstruction by which the union will be consolidated forever."). But Congress recognized that enfranchisement on paper would not necessarily produce enfranchisement in practice. The District of Columbia suffrage bill therefore included two sections penalizing interference with the voting rights established by the

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[2] Although U.S. Const. art. I, § 4, and U.S. Const. art II, § 1, cl. 4, gave Congress power to regulate federal elections, those powers did not apply to elections of state officials. And, even with respect to federal elections, Congress had not frequently used its Article I powers. Congress did not pass any regulations of federal elections until 1842 and did not pass comprehensive regulations until 1870 as part of the First Enforcement Act. *See Ex parte Siebold*, 100 U.S. 371, 382-84 (1879); *Ex parte Yarbrough (The Ku Klux Cases)*, 110 U.S. 651, 662 (1884) (noting that, before the Enforcement Acts, Congress had, "through long habit and long years of forbearance . . . in deference and respect to the states, refrained from the exercise of these powers").

[3] Subject to restrictions on age, duration of residency, criminal history, and other such factors, the Act stated that "each and every male person . . . shall be entitled to the elective franchise, and shall be deemed an elector and entitled to vote at any election in said District, without any distinction on account of color or race." 14 Stat. 375, § 1.

Act.[4] From the very beginning, Congress thus recognized that the success of voting rights laws depended on forceful legislation, including ancillary civil and criminal enforcement mechanisms, to ensure that those rights could be meaningfully exercised.

To enact the District of Columbia suffrage bill, Congress had to override a presidential veto. *See* William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* 30 (1965). That same month, Congress overrode a second presidential veto and passed legislation giving blacks the right to vote in other geographic areas subject to federal control. *See* An Act to Regulate the Elective Franchise in the Territories of the United States, ch. 15, 14 Stat. 379 (1867). And just two weeks later, Congress required that the Territory of Nebraska abolish all racial qualifications on voting before it could be admitted into the Union. *See* An Act for the

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[4] Sections 2 and 3 of the District of Columbia suffrage bill read:

> [A]ny person whose duty it shall be to receive votes at any election within the District of Columbia, who shall willfully refuse to receive, or who shall willfully reject, the vote of any person entitled to such right under this act, shall be liable [criminally and in tort].

14 Stat. 375, § 2.

> [I]f any person or persons shall willfully interrupt or disturb any such elector in the exercise of such franchise, he or they shall be deemed guilty of a misdemeanor . . . .

Id. § 3.

Admission of the Territory of Nebraska into the Union, ch. 36, 14 Stat. 391, § 3 (1867) ("[T]his act shall not take effect except upon the fundamental condition that within the State of Nebraska there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed.").

Most significantly, in the First Reconstruction Act Congress refused to re-admit the former Confederate states into the Union unless the states amended their constitutions to allow voting by male citizens "of whatever race, color, or previous condition." An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, § 5 (1867) ("First Reconstruction Act"). Recognizing the possibility of backsliding, Congress also required that, in the future, "the constitutions of neither of [the readmitted states] shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State." *E.g.*, An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to Representation in Congress, ch. 70, 15 Stat. 73, § 1 (1868). Congress was acutely aware that the fragile gains it had achieved could easily be rolled back if left unprotected and, as discussed below, ultimately found it necessary to adopt a constitutional amendment to solidify its own powers to guarantee such protection.

B. Southern Violence and Intimidation Threatened to Undermine Recent Gains in Enfranchisement.

Although Congress had succeeded in formally enfranchising blacks throughout the former Confederacy and federally controlled territories by the end of 1868, those legal rights were already being undermined by violence and intimidation. The period leading up to the 1868 election saw one of the greatest waves of racial violence in American history. At least 65 blacks were lynched in 1868 in Louisiana alone, most in the six-month period from May to November immediately leading up to the elections. Gilles Vandal, *Rethinking Southern Violence* 93-94 (2000). In northern Alabama, the Ku Klux Klan spread "a nameless terror among negroes, poor whites," and other prospective Republican voters. Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* 101 (1971). In Camilla, Georgia, "400 armed whites, led by the local sheriff, opened fire on a black election parade"; similar riots rocked Pulaski, Tennessee (the birthplace of the Klan), St. Landry Parish, Louisiana, and dozens of other communities. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 342 (1st Perennial Classic ed. 2002).

The connection between violence and suffrage was both explicit and pervasive. L.N. Trammell, who eventually became president of the Senate when the Democrats gained control in 1871, demanded in March 1868 that "'the negroes should as far as possible be kept from the polls,'" adding that "'the

organization of the KKK might effect this more than anything else.'" Laughlin McDonald, *A Voting Rights Odyssey: Black Enfranchisement in Georgia* 21 (2003); *see also* Lee W. Formwalt, *The Camilla Massacre of 1868: Racial Violence as Political Propaganda*, 71 Ga. Hist. Q. 400, 402-03 (1987). Republicans in Georgia and Louisiana abandoned their campaigns because they were "[u]nable to hold meetings and fearful that attempts to bring out their vote would only result in further massacres." Foner, *Reconstruction*, at 342.

The southern resistance did not end once the ballots were counted. In 1868, the Klan assassinated a black Republican congressman from Arkansas and three black members of the South Carolina state legislature. Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* 3 (2008). And in the summer of 1868, Georgia's governor—despite the State's ratification of the Fourteenth Amendment—asserted that the state constitution did not permit blacks to hold legislative office and expelled 32 black representatives from the state assembly, prompting Congress to place Georgia under military rule. *See* McDonald, *Voting Rights Odyssey*, at 23.

The Congress that drafted the Fifteenth Amendment was well aware of this devastating bloodshed and properly understood it as an effort to nullify the First Reconstruction Act's establishment of voting rights for southern blacks. *See* Foner, *Reconstruction*, at 342-44; Angela Behrens, Christopher Uggen, & Jeff Manza, *Ballot Manipulation and the 'Menace of Negro Domination':*

Racial Threat and Felon Disenfranchisement, 1850-2002, 109 Am. J. Soc. 559, 560 (2003).

C. Congress Was Concerned that Its Pre-Fifteenth Amendment Powers Were Inadequate to Protect Enfranchisement in States Readmitted Into the Union.

In addition to private violence, Congress also faced a looming structural problem. As the Confederate states began to be re-assimilated into the Union, Republicans were concerned that Congress's constitutional power to protect black enfranchisement would vanish. "Now that most of the ex-Confederate States had been in measure rehabilitated it was realized that the practically complete control which Congress had exercised over them was gradually slipping away and must eventually come to an end." John Mabry Mathews, *Legislative and Judicial History of the Fifteenth Amendment* 20 (1909). In theory, the former Confederate states were bound in perpetuity never to amend their constitutions to disenfranchise their citizens on account of race, but "[t]he fear was freely expressed however that the theory of the equality of the States was too deeply rooted in our constitutional system ever to make the observance of such a condition practically enforceable." *Id.* at 18.

Once the former Confederate states were readmitted into the Union, the source of the legal authority to protect suffrage on an ongoing basis became less clear. At a time when enforcement was most needed, Congress thus faced the possibility of losing its legal authority to protect the right to vote.

The Fifteenth Amendment was therefore necessary to "supply[] a new basis for the continuance of congressional control over the suffrage conditions of the Southern States. This basis could be surely and safely supplied only by means of a new grant of power from the nation in the form of a suffrage amendment to the Constitution which should contain the authorization to Congress to enforce its provisions." *Id.* at 21.

The Amendment would also enfranchise blacks in the Northern states, most of which still prohibited blacks from voting. From 1865 to 1869, white voters in the northern states had rejected eight of eleven state referenda that would have ended racial restrictions on voting. J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, *in* Bernard Grofman & Chandler Davidson, eds., *Controversies in Minority Voting: The Voting Rights Act in Perspective* 137 (1992). Congressional Republicans believed that only a constitutional amendment would empower Congress to override these referenda and enfranchise blacks in the loyal states that had never seceded. *See* Cong. Globe, 40th Cong., 3d Sess. 555 (1869) (statement of Rep Boutwell) (arguing that, without a constitutional amendment, "the subject is not within the proper scope of legislative power, and that the only way to secure the equality of suffrage to the people of this country, without distinction of race or color, is by an amendment to the Constitution").

D. The Fifteenth Amendment Was Designed to Set a Baseline Guarantee Against Racial Discrimination in Voting and to Ensure that Congress Would Retain the Constitutional Powers to Protect that Right.

Against this backdrop, the two clauses of the Fifteenth Amendment served complementary purposes. First, the substantive guarantee in the first section of the Amendment would consolidate the formal gains that had been previously made and ensure that they were not rolled back by future electoral majorities. "Republicans sensed that control of the national government might be slipping from their grasp, that white Southerners were intensifying their opposition to black equality, and that something had to be done to guarantee black political rights, particularly in the event that the Democrats returned to power in the South or nationally." Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 93-94 (2000). The Amendment would set a constitutional floor to "make it impossible, if the Democrats ever returned to power in Washington, to repudiate Negro voting, North or South." Gillette, *Right to Vote,* at 73; *see also* Cong. Globe, 40th Cong., 3d Sess. app. 97 (1869) (statement of Rep. Bowen) ("This rule . . . should be established by constitutional amendment . . . otherwise it will be subject to change, and thus of uncertain duration and use."); *id.* at app. 102 (statement of Rep. Broomall) ("Laws may be repealed, and it is not advisable that so important a principle of republican

government should be left to the caprices of party. Its proper place is in the organic law.").

Second, the enforcement power provided in the Amendment would give Congress continuing constitutional power to protect black suffrage even once it ceded supervisory control over the former Confederacy. The Amendment would give Congress "a general commission to make detailed statutes" protecting against racial discrimination in voting. Richard Vallely, *The Two Reconstructions: The Struggle for Black Enfranchisement* 103 (2004). The power given to Congress to protect the franchise thus provided an "alternative to . . . the continued military occupation of the South." Vikram D. Amar & Alan E. Brownstein, *The Hybrid Nature of Political Rights*, 50 Stan. L. Rev. 915, 940-41 (1998). And it would give Congress power to protect the right to vote in the North, where elections had been under the exclusive control of the states. Gillette, *Right to Vote,* at 73.

Together, by creating a nation-wide ban on racial discrimination in voting and providing Congress a new source of power to enforce that right, the provisions of the Fifteenth Amendment were designed to ensure that recent gains in enfranchisement would be doubly protected, both from future electoral rollbacks and from attempts to undermine the formal promise of racial equality in voting.

II. The Fifteenth Amendment Marked a Fundamental Structural Change with Respect to Congress's Role in Protecting the Right to Vote.

The Fifteenth Amendment represented a fundamental structural change in at least three ways. First, the Amendment enshrined the right to vote as a right essential to achieving racial equality. Second, the Amendment transferred to the federal government control over an area that had once been left to the exclusive control of the states. And, third, the Amendment provided that Congress would take a primary role in protecting the new federal rights the Amendment had created.

A. The Fifteenth Amendment Codified the Fundamental Importance of the Right to Vote.

The Republicans who championed the Fifteenth Amendment viewed the franchise as "[t]he centerpiece of Reconstruction." Kousser, *Voting Rights Act and Two Reconstructions*, at 136. They sought to leave nothing to chance in ensuring that the foundational principle of electoral equality received full constitutional protection, both in theory and in practice.

Through the Fourteenth Amendment, Congress and the states had already guaranteed equal protection generally. But the framers of the Fifteenth Amendment singled out the right to vote for special protection. They recognized the right to vote as a foundational right needed to secure all others. "Without the elective franchise," they asked, "what insurance has a man of his life, what security for his liberties, what protection in his pursuit of

happiness?" Cong. Globe, 40th Cong., 3d Sess. app. 100 (1869) (statement of Rep. Hamilton). Congress knew that the ballot box would ultimately provide more lasting protections than piecemeal legislation: "the ballot was absolutely essential to [the] protection against oppression and wrong in a thousand forms where the general law would be powerless." Thomas M. Cooley, *Impartial Suffrage Established, in* II Joseph Story & Melville Madison Bigelow, eds., *Commentaries on the Constitution of the United States* 718 (5th ed. 1891). "A man with a ballot in his hand is the master of the situation. He defines all his other rights. What is not already given him, he takes. . . . The Ballot is opportunity, education, fair play, right to office, and elbow-room." William Gillette, *Retreat from Reconstruction, 1869-1879* 23 (1979) (quoting Wendell Phillips).

Supporters also viewed the right to vote as a source of empowerment for the recently freed slaves. The Amendment would "place in the hand of the black man of Georgia a rod of power before which all politicians quail"—a certain vote. Cong. Globe, 40th Cong., 3d Sess. 1629 (1869) (statement of Sen. Stewart). Republicans believed that equal suffrage would "'confer[] upon the African race the care of its own destiny. It places their fortunes in their own hands.'" Foner, *Reconstruction,* at 449 (quoting then-Congressman James Garfield).

Finally, the Amendment's supporters saw political equality as a critical step towards achieving social equality. "[T]he ballot . . . is at once authority and protection, a badge of power, and a shield of defense, a schoolmaster for the ignorant, a lifter-up

of the lowly, and a bond of fraternal union for all." Cong. Globe, 40th Cong., 3d Sess. app. 146 (1869) (statement of Rep. French). As Representative Whittemore urged: "Give the colored man his vote; then and not till then will disloyalty be crushed; . . . then and not till then will the material which feeds the flame of partisan and sectional strife be removed forever." *Id.* at app. 93.

By codifying a prohibition on racial discrimination in voting as part of the Constitution, the framers of the Fifteenth Amendment thus singled out the right to vote as a uniquely important right. The Fifteenth Amendment enshrined the right to vote as a centerpiece of Reconstruction and as a foundational constitutional guarantee of racial equality.[5]

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[5] The debates surrounding the passage of the Fifteenth Amendment make clear that the final version of the Amendment was also understood to protect racial groups other than those of African descent. *See Extension of the Voting Rights Act of 1965: Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 94th Cong. 698 (1975) (noting that some legislators opposed the Fifteenth Amendment precisely because it would protect more than just blacks and that California and Oregon refused to ratify the Amendment because of "fear that it would lead to enfranchisement of Chinese Persons"). Indeed, the Reconstruction Senate "twice rejected . . . a provision which stated that: 'Citizens . . . of African descent shall have the same right to hold office . . . as other citizens.'" *Id.* Additionally, this Court's precedent establishes that Latinos, Asian Americans, and Native Americans are protected by the Fifteenth Amendment. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (holding that because "[a]ncestry can be a proxy for a race,"

B. The Fifteenth Amendment Made Racial Discrimination in Voting a Central Concern of the Federal Government.

The Fifteenth Amendment radically altered the balance of power between the federal government and the states with respect to regulations of the voting franchise. The Amendment was passed against a status quo in which the states had exercised control over the franchise and Congress's control, as a practical matter, had been limited to protecting the right to vote in federal territories. The Fifteenth Amendment broke with that status quo by transferring ultimate power to protect against racial discrimination in voting away from the states and to the federal government—even with respect to the States' own elections. The Congress that passed the Fifteenth Amendment and the states that ratified it determined that the traditional federal-state balance had been insufficient to protect against racial discrimination in voting.

As late as 1866, even among northern Republicans, "[t]here was a feeling too widespread to be safely antagonized that the regulation of the suffrage was a matter properly belonging to the state governments." Mathews, *History of the Fifteenth Amendment,* at 12. But the Fifteenth Amendment broke with those past assumptions. "The fact . . . that the national legislature was authorized to enforce the prohibition upon the States carried the

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discrimination based on common ancestry or culture violates the Fifteenth Amendment).

national power over suffrage into a sphere whither it had not previously extended." *Id.* at 36.

It was recognized both by the Amendment's supporters and opponents that the Amendment would transfer to the federal government responsibility over an area that had once been left exclusively to the states. For example, Senator John Pool, a strong supporter of the Amendment, explained that: "If a State by omission neglects to give every citizen within its borders a free, fair, and full exercise and enjoyment of his rights, it is the duty of the United States Government to go into the State." Xi Wang, *The Making of Federal Enforcement Laws, 1870-1872*, 70 Chi.-Kent L. Rev. 1013, 1030 (1995). Similarly, Senator Bayard, an opponent of the proposed Amendment, contrasted the power provided by the Amendment with the autonomy states had previously enjoyed over their own elections: "The Federal Government in the past has neither attempted to usurp the power as within the limits of the Constitution, nor has it been yielded by the States or their people." Cong. Globe, 40th Cong., 3d Sess. app. 166 (1869).

Even some abolitionists and former Republicans protested the Amendment's intrusion on principles of state sovereignty. James Doolittle, a Wisconsin Republican who supported the abolition of slavery but believed questions of voting were best left to the states, predicted that the power to enforce the Fifteenth Amendment would give Congress complete control over state elections:

> [T]he power to enforce it of necessity implies power over the elections of the States. In order to give the colored man of the States the right to vote at the elections in the States, to secure to his vote a fair count, and to make sure that if his vote be counted and determine the result that the person elected shall have the office, will draw to this Government the power to control the elections themselves. It is impossible to separate the two.

Id. at app. 151. Similarly, James Dixon, a disillusioned former Republican who had recently switched parties, envisioned federal laws usurping state sovereignty over their own elections:

> It is not a question of negro suffrage alone, it is a question of suffrage in its widest sense. . . . It is the question who shall be the voter. It is the question of suffrage in the State of Connecticut, and by whom shall its regulation be established? That, the people of Connecticut will remember, is the question which is presented now, whether the Congress of the United States and the people of all the States of the United States shall invade the borders of that ancient republic and compel her to change her laws.

Id. at 861.

Both the proponents and opponents of the Fifteenth Amendment thus understood the Amendment to dramatically alter the status quo by installing the federal government, and Congress in particular, as the ultimate protector against racial

discrimination in voting. The Amendment carved out an area once believed to belong exclusively to the states and transferred power from the states to the federal government. As the Supreme Court recognized soon after the Amendment's passage: "The fifteenth amendment of the constitution, by its limitation on the power of the states in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the states." *Ex parte Yarbrough (The Ku Klux Cases)*, 110 U.S. 651, 664 (1884).

C. The Fifteenth Amendment Vested Congress with Primary Responsibility for Enforcing the Amendment's Guarantees.

Finally, the Amendment vested Congress with primary authority for enforcing the new constitutional guarantee against racial discrimination in voting and with wide remedial powers to achieve that goal. Congress knew from the beginning, based on its experience with prior efforts to enfranchise blacks in the District of Columbia, federal territories, and former Confederate states, that the Fifteenth Amendment would require a vigorous enforcement mechanism. "[T]here was never any difference of opinion among the friends of the measure, either as to the desirability of including . . . [an enforcement provision] in the Amendment or as to the form which it should assume." Mathews, *History of the Fifteenth Amendment*, at 36 n.55.

The Amendment set a constitutional floor prohibiting discrimination but also empowered Congress to take those steps it believed important to preclude such discrimination. Republicans who preferred a broader constitutional amendment were willing to accept a narrower version of Section 1 precisely because Section 2 would provide Congress with additional enforcement power to transform the negatively phrased Section 1 into a positive guarantee:

> If there were nothing at all here except the first section I might see a great deal of weight in [a concern that section 1's purely negative formulation leaves states able to devise indirect means of disenfranchising African-Americans]. But there happens to be added to that a second section, giving to Congress the express power to enforce the prohibition. The result of the whole matter is that if we amend this first section [to a form almost identical to the one ultimately enacted], . . . by the second section Congress is invested with express authority to enforce the limitation.

Cong. Globe, 40th Cong., 3d Sess. 727 (1869) (statement of Rep. Bingham); *see also id.* at 1625 (statement of Sen. Howard).

Opponents of the Amendment similarly noted that the enforcement clause would give Congress substantial discretion to determine the scope of its own enforcement power. *See id.* at app. 163 (statement of Sen. Saulsbury) (warning that enforcement clause language "leav[es] [the]

legitimate and proper meaning [of 'appropriate' legislation] to be determined by each particular head in this Senate Chamber and in the House of Representatives" and asking "[u]nder the exercise of the power to carry this amendment into execution by appropriate legislation what cannot you do?") .

Almost immediately after the Amendment was ratified, Congress enacted the Enforcement Act of 1870, which reflected Congress's belief that the Amendment was designed to give Congress broad enforcement powers to pass affirmative legislation protecting against racial discrimination in voting. *See* Mathews, *History of the Fifteenth Amendment*, at 78-79. Supporters of the bill, almost all of whom had voted for the Amendment sixteen months earlier, invoked Congress's broad power when discussing the Act. For example, Senator Carpenter stated that "[t]his amendment to the Constitution is ample and full, and clothes Congress with all power to secure the end which it declares shall be accomplished." Cong. Globe, 41st Cong., 2d Sess. 3563 (1870). Representative Davis similarly argued that "[i]n amending the Constitution of the United States the people have seen fit to clothe Congress with the power to enforce by appropriate legislation. . . . No broader language could be adopted than this with which to clothe Congress with power." *Id.* at 3882.

Senator Morton referenced "the spirit and the true intent of the fifteenth amendment" while rebutting arguments that the 1870 enforcement legislation intruded too far on the sovereignty of the states. Invoking the 1868 debates, Morton argued

that the Amendment's purpose was to ensure that "the colored man, so far as voting is concerned, shall be placed upon the same level and footing with the white man, and that Congress shall have the power to secure him that right. . . . We know that the second Section was put there for the purpose of enabling Congress itself to carry out the provision. It was not to be left to State legislation." *Id.* at 3670. And Senator Howard similarly warned that the Amendment should not be given a "narrow construction" that would prevent Congress from "apply[ing] the remedies which are proper in the case to punish individuals for interrupting, preventing, delaying, or hindering the colored man from the peaceful and free exercise of his right of suffrage; which was the great object we had in view in proposing this amendment to the people of the United States." *Id.* at 3655.

Congress ultimately enacted seven suffrage-related sections as part of the 1870 Enforcement Act, powerfully demonstrating that the Forty-First Congress viewed the Fifteenth Amendment's enforcement clause as a substantial source of authority. *See* Act of May 31, 1870, ch. 114, 16 Stat. 140. Section 1 of the Act simply restated the core principle behind the Fifteenth Amendment without creating any enforceable rights. But each of the other six sections contained an aggressive, affirmative mandate that was national in scope. These provisions were designed not merely to ensure that voting rights remained formally intact, but to ensure that neither states nor private actors took

steps to undermine the effectiveness of those voting rights.

Sections 2 and 3 of the Enforcement Act prohibited discrimination in voter registration. Section 2 imposed a positive duty on state election officials "to give to all citizens of the United States the same and equal opportunity to perform" any prerequisite to voting, such as paying a poll tax or passing a literacy test, "and to become qualified to vote without distinction of race, color, or previous condition of servitude." 16 Stat. 140, § 2. Section 3 provided that a person denied the opportunity to perform a prerequisite to voting "by reason of the wrongful act or omission" of anyone involved in the registration process "shall be entitled to vote in the same manner and to the same extent as if he had in fact performed" the prerequisite. *Id.* § 3.

The next three sections targeted violence and intimidation aimed at suppressing the vote. Section 4 barred "any person, by force, bribery, threats, intimidation or other unlawful means" from "prevent[ing] or obstruct[ing]" citizens from performing any prerequisite or from voting. *Id.* § 4. Section 5 precluded landlords and employers from retaliating against their tenants and employees in order to "prevent, hinder, control or intimidate . . . any person from exercising . . . the right of suffrage, to whom the right of suffrage is secured or guaranteed by the fifteenth amendment." *Id.* § 5. Section 6, which enforced rights under the Fourteenth Amendment as well as the Fifteenth, outlawed conspiracies "to injure, oppress, threaten, or intimidate any citizen with intent to prevent or

hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same." *Id.* § 6.

Finally, Section 23 permitted a candidate for office who lost "by reason of the denial to any citizen or citizens . . . of the right to vote, on account of race, color, or previous condition of servitude" to sue to "recover possession" of the office. *Id.* § 23. Congress thus empowered the federal courts to nullify state election results if those results were tainted by racial disenfranchisement.

Taken together, this set of bold provisions make clear that the contemporary Congress was not "constrained by traditional theories of federalism." Kousser, *Voting Rights Act and Two Reconstructions*, at 139. Congress understood its enforcement power to be extremely broad, encompassing a range of prophylactic measures not compelled by Section 1 of the Amendment but which Congress deemed necessary to achieve the Amendment's objectives.

A year after passing the 1870 Enforcement Act, Congress went even further, amending Section 20 of the Act to place congressional elections more firmly under federal control. Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 ("1871 Enforcement Act"). These amendments provided for detailed supervisory powers over the electoral process, from registration to the certification of returns. The statute provided that if any two citizens of a city or town "make known, in writing, to the judge of the circuit court of

the United States for the circuit wherein such city or town shall be, their desire to have [a] registration, or [an] election, or both, guarded and scrutinized," then the judge shall appoint a supervisor. *Id.* § 2. The supervisors' duties were described in detail and included personally scrutinizing and counting ballots, making returns, keeping the peace, and preventing fraud. *See* VI James Ford Rhodes, *History of the United States from the Compromise of 1850 to the McKinley-Bryan Campaign of 1896* 423 (1906) ("A host of supervisors were to be appointed by the judges of the United States courts who should see that the voting was fair and the count honest."). These broad enforcement acts "were comprehensive . . . but the fact is that they did not go beyond the intent of the Fifteenth Amendment." Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J. So. Hist. 202, 204 (1962).

In addition to the provisions in the 1871 Enforcement Act, in the Ku Klux Klan Act of 1871, Congress authorized the President to deploy the army to respond to "insurrection, domestic violence, unlawful combinations, or conspiracies" that had the effect of depriving citizens of "any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act," including the Fifteenth Amendment's guarantee of equal suffrage. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, § 3.

These enforcement laws, which were enacted by substantially the same Congress that drafted the Fifteenth Amendment, are entitled to special weight in construing the Amendment. Like the first Congress in 1789, the Congress in 1870 "must have

felt, with peculiar force, the obligation of providing efficient means by which [a] great constitutional privilege should receive life and activity." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807); *cf. Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its meaning.'" (quoting *Wisconsin v. Pelican Ins. Co.*, 124 U.S. 165, 297 (1888))). The enforcement legislation reflects the contemporary understanding that the Fifteenth Amendment entrusted to Congress primary responsibility for protecting against racial discrimination in voting and vested Congress with all the powers necessary for accomplishing that task.

III. Early Supreme Court Precedent Recognized that the Fifteenth Amendment Vested Congress with Especially Broad Powers to Protect Against Racial Discrimination in Voting.

The Supreme Court shared the contemporary understanding that the Fifteenth Amendment represented a major transfer of authority from the states to the federal government and vested Congress with broad powers to enforce the Amendment's prohibition on racial discrimination in voting. Even as it placed severe restrictions on Congress's efforts to enforce the Reconstruction Amendments in the 1870s and 1880s, the Court signaled that Congress's authority to enforce the

Fifteenth Amendment was even greater than its authority to enforce the Fourteenth Amendment.

The Court's decision in *United States v. Cruikshank*, 92 U.S. 542 (1876), illustrates its differing approaches to the Fourteenth and Fifteenth Amendments. The Court in *Cruikshank* overturned the convictions of white supremacists who led the infamous Colfax Massacre, "the bloodiest single act of carnage in all of Reconstruction," Foner, *Reconstruction*, at 530, and "the largest murder of African Americans in American history," Kousser, *Voting Rights Act and Two Reconstructions*, at 160. While the decision had "disastrous" results for Reconstruction, for example, by imposing insurmountable burdens of proof on the prosecution, *id.*, it actually upheld the constitutionality of the Enforcement Acts and affirmed that Congress had particularly broad authority with respect to the Fifteenth Amendment. "[B]uried in an otherwise devastating opinion, the Supreme Court expressly accepted national action as part of the 'protecting power of Congress'—which is exactly what had been at stake during this period." Vallely, *Two Reconstructions*, at 119; *see* Robert M. Goldman, *Reconstruction and Black Suffrage: Losing the Vote in* Reese *and* Cruikshank 106 (2001) (noting that *Cruikshank* was a surprisingly "narrow" decision that "clearly and explicitly confirmed congressional authority" to protect against racial discrimination in voting).

The defendants in *Cruikshank* were charged with violating the constitutional rights of the black victims they had killed. In examining the 32-count

indictment, the *Cruikshank* Court used a markedly different analytical approach depending on whether a count of the indictment implicated the Fourteenth Amendment or the Fifteenth. With respect to counts of the indictment that sought to enforce the Fourteenth Amendment against non-state actors, the Court invalidated the Enforcement Act as beyond Congress's powers. According to the Court, the Fourteenth Amendment did not create any new federal constitutional rights enforceable against individuals. Black citizens had to look to the state to protect their freedom of assembly, right to bear arms, and right to life, liberty, and property. The Court stated that none of those rights was "committed by the people to the protection of Congress" or "within the general scope of the authority granted to national government." *Cruikshank*, 92 U.S. at 552. The opinion thus "systematically shattered the implicit justification in Reconstruction constitutionalism of every count, except for those based on the Fifteenth Amendment." Vallely, *Two Reconstructions*, at 118.

The Court also found the counts based on the Fifteenth Amendment deficient, but it did so through a crabbed reading of the indictment, while affirming the breadth of Congress's enforcement power. The Court pointedly did not invalidate Congress's power to protect equal suffrage and affirmed that the Fifteenth Amendment (unlike the Fourteenth) did create "a new constitutional right" that Congress could protect against individual interference. *Cruikshank*, 92 U.S. at 555. The Fifteenth Amendment, the Court explained, had established

the "exemption from discrimination in the exercise of" the right to vote as a "necessary attribute of national citizenship." *Id.* at 555-56. Congress had primary responsibility for protecting against racial discrimination in voting because "[t]he right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States." *Id.* at 556. And within this intersection of race and voting, primary responsibility was vested in Congress, not the states.

Instead of declaring that Congress lacked the power to enforce the Fifteenth Amendment, the *Cruikshank* Court invalidated the convictions on technical grounds, leaving the Enforcement Act on the books and allowing future prosecutions to continue. *See* Lane, *The Day Freedom Died*, at 251-52; Goldman, *Reconstruction and Black Suffrage*, at 109.[6] The Court asserted that the indictment was flawed because it did not specifically allege "that the

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[6] The same day that it decided *Cruikshank*, the Court, in *United States v. Reese*, 92 U.S. 214 (1875), invalidated a portion of the Enforcement Act on vagueness grounds because the text of the statute did not clearly indicate whether it covered all deprivations of the right to vote or solely deprivations made on account of race. Rather than adopting a limiting construction requiring that the deprivation be made on account of race, the Court invalidated the applicable sections. *Id.* at 221. Congress promptly reenacted the portions of the Enforcement Act voided in *Reese* two months after the Court's decision. "The two new sections, 5506 and 5507 of what were now known as the Revised Statutes, were more specific than the earlier sections voided by the Court, but were still based on the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment." Goldman, *Reconstruction and Black Suffrage*, at 109 (internal quotation marks omitted).

intent of the defendants was to prevent these parties from exercising their right to vote on account of their race." *Cruikshank*, 92 U.S. at 556. The Court stated that "[w]e may suspect that race was the cause of the hostility, but it is not so averred." *Id.* Commentators have criticized the Court's strained reading of the indictment as "deeply disturbing": "If 105 black bodies did not prove racial animosity, what would?" Kousser, *Voting Rights Act and Two Reconstructions*, at 161. Judge Hugh Lennox Bond even sent a private letter to Chief Justice Waite referring to the *Cruikshank* opinion as a "'Dred' decision." Lane, *The Day Freedom Died*, at 247. But, despite the heavy burden of proof imposed on prosecutors, the government continued to obtain convictions under the Enforcement Act through the administrations of Presidents Hayes, Garfield, and Arthur. *Id.* at 251.[7]

The history of the Fifteenth Amendment thus shows that whatever the limits on Fourteenth Amendment enforcement powers, Congress's Fifteenth Amendment power is a sweeping power so long as Congress is acting to prevent racial discrimination in voting. "On the rare occasions when the Court has found an unconstitutional exercise of [Fifteenth Amendment] powers, in its

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[7] As a doctrinal matter, subsequent cases following *Reese* and *Cruickshank* have cast doubt on whether the Fifteenth Amendment empowers Congress to address private conduct. *See James v. Bowman*, 190 U.S. 127 (1903). But whether or not the doctrinal views of *Reese* and *Cruikshank* that the Fifteenth Amendment reaches private conduct remain good law, the cases reflect as a historical matter the contemporary understanding of the Supreme Court.

opinion Congress had attacked evils not comprehended by the Fifteenth Amendment." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). Indeed, when Congress passed the Voting Rights Act in 1965, the Senate and House Reports noted that "[n]o statute confined to enforcing the 15th amendment exemption from racial discrimination in voting has ever been voided by the Supreme Court." S. Rep. No. 89-162, at 17 (1965); H.R. Rep. No. 89-439, at 17 (1965).

IV. Congress's Enforcement of the Fifteenth Amendment Is Entitled to Special Deference.

The history of the Fifteenth Amendment and the structural changes it created indicate that Congress should be afforded special deference in enforcing the Fifteenth Amendment's prohibition on racial discrimination in voting. The Fifteenth Amendment is a narrowly targeted provision designed to protect a right of extreme national importance. Perhaps more than any of the other Reconstruction Amendments, the Fifteenth Amendment carved out an area that had traditionally been left exclusively to the states and transferred primary control to the federal government. Indeed, the Fifteenth Amendment was designed for the very purpose of altering the federal-state balance to allow Congress to continue to protect the right to vote even once the former Confederacy was re-integrated into the Union.

The structure of the Fifteenth Amendment further justifies such deference. Unlike the Fourteenth Amendment, where the Court must define the scope of such broad phrases as "equal

protection" and "due process," the framers of the Fifteenth Amendment defined its substance in simple, straightforward terms. The focus on a single, fundamental right inherently cabins Congress's enforcement power to a relatively narrow but critical area. Because the Fifteenth Amendment is limited to the narrow subject of racial discrimination in voting, there is no risk that Congress could use the Fifteenth Amendment to "prescribe uniform national laws with respect to life, liberty, and property," *City of Boerne v. Flores*, 521 U.S. 507, 523 (1997), or "rewrite the Bill of Rights," *Tennessee v. Lane*, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting). In other words, because the Amendment operates only within a limited sphere of the intersection of racial discrimination and the right to vote, Congress's sweeping powers to enforce the Amendment do not pose any risk of undermining general principles of federalism or separation of powers.

In contrast, history shows that limiting Congress's Fifteenth Amendment power would pose significant risks and that gains in voting rights are fragile and tenuous. The framers of the Fifteenth Amendment "fully realized that enfranchisement required practical safeguards against evasions of the law and retrogression." Kousser, *Voting Rights Act and Two Reconstructions*, at 137. One of the central lessons of the Reconstruction period is that "revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward; that enormous gains can be lost and jeopardized, eroded, or diluted, and abridged in spite of the enormous cost that those advances have

made." *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 2027 (1982) (statement of C. Vann Woodward, Professor Emeritus of History, Yale University). History continued to prove the framers right both with respect to voting rights in particular and equal protection more generally. After the Supreme Court in *Reese*, *Cruikshank*, and similar cases invalidated Fourteenth Amendment legislation and frustrated Fifteenth Amendment legislation on technical grounds, an increasingly passive and Democratic Congress in 1894 failed to pass or reauthorize new enforcement legislation, and the South lapsed into nearly 75 years of Jim Crow. Just as the framers of the Fifteenth Amendment feared, without robust legislation from Congress, hard-won gains were gradually rolled back. *Katzenbach*, 383 U.S. at 310-11.

It took renewed congressional action in the Voting Rights Act before gains in enfranchisement resumed. "Passage of the Voting Rights Act was an important first step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett v. Strickland*, 556 U.S. ___, 2009 WL 578634, at *6 (Mar. 9, 2009). Section 5 of the Voting Rights Act (both as originally enacted and as reenacted) was designed to prevent renewed retrogression. It addresses the same concerns that animated the framers of the Fifteenth Amendment. This Court has observed that "Section 5 was directed at preventing a particular set of invidious practices

that had the effect of 'undo[ing] or defeat[ing] the rights recently won by nonwhite voters.'" *Miller v. Johnson*, 515 U.S. 909, 925 (1995) (quoting H.R. Rep. No. 91-397, at 8 (1969)). "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). Like the Fifteenth Amendment itself, Section 5 focuses not only on the current exercise of the right to vote, but also on ensuring that rights currently held are not eroded in the future.

It was not until after Congress enacted the Voting Rights Act of 1965 that the dream of equality at the core of the Fifteenth Amendment began to become a reality. This Court's decisions upholding Congress's renewed enforcement efforts have enabled Congress to make significant progress in reversing decades of neglect and fulfilling the promise of racial equality. *See Lopez v. Monterey County*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Katzenbach*, 383 U.S. 301. Congress has now once again concluded, after holding extensive hearings and gathering voluminous evidence, that discrimination against voters on the basis of race or color is far from eradicated and that the rights protected by the Amendment are still sufficiently fragile to require renewal of Section 5 and other provisions of the Voting Rights Act. The Fifteenth Amendment's history and this Court's decisions require that Congress's determination be given

special deference and that NAMUDNO's challenge be rejected.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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March 25, 2009

AMICUS CURIAE BRIEF

No. 08-322

In The Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER JR., Attorney General of the United States of America, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF JULIUS CHAMBERS, ARMAND DERFNER, JAMES U. BLACKSHER, ANITA EARLS, ROBERT McDUFF, EDWARD STILL, ELLIS TURNAGE, CYNTHIA McCOTTRY SMITH, BERNARD R. FIELDING, MARJORIE AMOS-FRAZIER, LEE H. MOULTRIE, SOUTHERN ECHO, AND DEMOCRACY NORTH CAROLINA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE[1]

Amici curiae are individuals and organizations that work to protect minority voting rights in covered and non-covered jurisdictions across the South.

Attorney amici are members of the private voting rights bar, and collectively have spent over 200 years working on voting rights cases. Together, they have testified in every congressional reauthorization hearing regarding Section 5 since 1971, and have extensive knowledge of the expense, time, and endless rounds of litigation required to effectively prosecute cases under Section 2 of the Voting Rights Act. Amici curiae are acutely aware that in the absence of the preclearance requirement, the resources available to enforce the Voting Rights Act through private litigation are completely insufficient to protect the rights guaranteed to minority voters under the Fifteenth Amendment.

James U. Blacksher is an attorney in Birmingham, Alabama. He argued *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and has briefed several other voting rights cases before this Court, including *Sinkfield v. Kelley*, 531 U.S. 28 (2000).

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[1] This brief of amici curiae is filed with the consent of the parties. Written consent of all parties is being filed with the Clerk of Court together with this brief, in accordance with this Court's Rule 37.3(a). No counsel for any party authored this brief in whole or in part, nor did any person other than amici and their counsel make a monetary contribution to the preparation or submission of this brief.

Julius Chambers is an attorney in Charlotte, North Carolina. A former director-counsel of the NAACP Legal Defense Fund, he has argued numerous cases before this Court, including *Thornburg v. Gingles*, 478 U.S. 30 (1986) and *Shaw v. Hunt*, 517 U.S. 899 (1996).

Armand Derfner is an attorney in Charleston, South Carolina, He has argued numerous Voting Rights Act cases before this Court, including *Allen v. State Board of Elections*, 393 U.S. 544 (1969), and *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985).

Anita Earls is an attorney in Durham, North Carolina. She is a former Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice, and the current executive director of the Southern Coalition for Social Justice.

Robert McDuff is an attorney in Jackson, Mississippi. He has argued several cases before this Court, including the Voting Rights Act cases of *Clark v. Roemer*, 500 U.S. 646 (1991) and *Branch v. Smith*, 538 U.S. 254 (2003).

Edward Still is an attorney in Birmingham, Alabama. He has tried and briefed Voting Rights Act cases in five states spanning the period from *Bolden*, 446 U.S. 55, to *Riley v. Kennedy*, 128 S. Ct. 1970 (2008).

Ellis Turnage is an attorney in Cleveland, Mississippi. He has been litigating cases under Sections 2 and 5 of the Voting Rights Act since 1983.

Cynthia McCottry Smith, Bernard R. Fielding, Marjorie Amos-Frazier, and Lee H. Moultrie are African-American citizens and registered voters from South Carolina who are active in voter education and organization in Charleston, and were plaintiffs or witnesses in the case of *Moultrie v. Charleston County*, the companion case to *United States v. Charleston County*, 316 F. Supp. 2d 268 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir.), *cert. denied*, 543 U.S. 999 (2004). Southern Echo and Democracy North Carolina are nonprofit organizations that work to protect voting rights in jurisdictions covered under Section 5 through voter registration, education, and organization. In the absence of Section 5 enforcement, these individuals and organizations would not be able to work effectively to ensure equal voting rights.

Amici therefore file this brief to explain why, if the goals of the Voting Rights Act are ever to be realized, the judgment below must be affirmed.

SUMMARY OF ARGUMENT

Appellant, a municipal utility district with "virtually no familiarity of its own with the election process" and an existence of less than two decades (Appellee's Br. 13), asserts that: (1) a "small number of objections" and a supposedly high number of

Section 2 lawsuits in two covered jurisdictions (Texas and Alabama) mean that Section 5 is redundant or ineffectual; and (2) Section 2 adequately addresses all voting discrimination that remains in covered jurisdictions (Appellant's Br. 44-48, 52.). Both premises are demonstrably false.

In comparison to Appellant's limited familiarity with elections, attorney amici collectively have more than 200 years of experience litigating voting rights cases in covered and non-covered jurisdictions throughout the country. This experience has led amici to recognize the persistent need for timely enforcement capable of deterring illegal voting schemes before they are implemented—a task for which case-by-case litigation under Section 2 is ill-suited, but for which Section 5 was designed.

Were Section 5 unavailable, there would be a significant increase in the number of discriminatory voting changes that voters and jurisdictions would be forced to address through litigation. But Section 2 cannot substitute for the prophylactic function of Section 5. In practice, amici have seen Section 2 and Section 5 operate in the complementary fashion that Congress intended. Where minority voters in covered jurisdictions cannot find a lawyer or afford to pay one, Section 5 provides the means to redress new violations of their rights. And where minority voters are able to get their day in court, Section 5 provides the assurance that their hard-won and expensive battles will not have been fought in vain if a jurisdiction repeats similar violations.

Too many discriminatory voting changes would remain unchallenged if Section 5 were invalidated. For individual minority voters, the cost and effort required to pursue Section 2 cases are great barriers to private enforcement, a problem made more acute by the small number of practitioners in covered jurisdictions who are willing and able to take such cases. This creates a perverse incentive—all too often realized—for officials to continue suspect practices because they know most voters cannot challenge them. In contrast, Section 5 serves as a deterrent to such practices.

Amici's lengthy experience in the voting rights arena shows the importance of Congress's considered decision to reauthorize Section 5. Without it, minority voters will fail to realize the full promise of the Voting Rights Act.

ARGUMENT

I. Amici's Experience Confirms That Section 2 Cannot Replace The Prophylactic Function Of Section 5; The Two Enforcement Mechanisms Are Complementary

Although Appellant contends that the amount of Section 2 litigation brought in nine wholly or partially covered states proves that such litigation alone is sufficient to prevent discriminatory voting practices (Appellant's Br. 48), its argument ignores that

Section 2 and Section 5 provide different protections and operate in very different ways.

A. As Designed By Congress, Section 2 And Section 5 Are Mutually Reinforcing

Section 2 and Section 5 provide separate but complementary and mutually reinforcing mechanisms to combat and remedy disfranchisement of minority voters. *See South Carolina v. Katzenbach*, 383 U.S. 301, 315-16 (1966). Section 2 provides citizens nationwide the right to sue to end any voting practice—whether new or old—that discriminatorily denies or abridges voting. *See* 42 U.S.C. § 1973. Under Section 2, the burden of proving the denial is on the voter and the litigation is highly complex, lengthy, and expensive. Section 5 applies prospectively to prevent jurisdictions with the worst records of discrimination from enacting retrogressive practices or reimposing a system that courts have found violates voters' rights. *See* 42 U.S.C. § 1973c. Under Section 5, the pre-approval requirement helps block and deter discriminatory voting changes at the outset and the cost to voters is comparatively tiny. Both Sections are necessary to ensure that minorities' rights are meaningfully protected.

Without Section 2, old voting practices could carry forward far into the future in all jurisdictions, regardless of Section 5's protections. Without Section 5 preclearance, many new discriminatory measures would go unchallenged because of the

absence of resources and sufficient lawyers to litigate them all under Section 2. Even if such practices are challenged, they could nevertheless infect multiple elections before voters obtain relief. (*See* NAACP Br. 42 (noting that Congress enacted Section 5 "to protect minority citizens from even a temporary impairment of this most fundamental of civil rights during the sometimes prolonged period needed to bring and ultimately prevail in Section 2 litigation.")) Moreover, "[w]hen a jurisdiction changes its election system in response to a Section 2 court order or to avoid Section 2 liability, Section 5 helps ensure that [later actors] will not water down the remedy." Robert Kengle, Voting Rights In Georgia, 1982-2006, at 26 (March 2006), referenced at *Renewing the Temporary Provisions of the Voting Rights Act: An Introduction to the Evidence: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 30 (2006) (list of voting rights reports).[2] Eliminating Section 5 would require minority voters to undertake the enormous time and expense of litigation every time a covered state or local government instituted a measure to dilute minority voting strength. (*See* NAACP Br. 43 ("Section 5 complements Section 2 by prescreening voting changes, and it thereby often spares minority groups the substantial costs of pursuing after the fact litigation.").)

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[2] All of the state reports referred to in the Senate hearing are available at http://www.civilrights.org/voting-rights/vra/states.html.

The experience of amici curiae in litigating voting rights cases confirms that Section 2 is not an adequate substitute for Section 5. First, the delay endemic to Section 2 litigation allows voting rights violations to persist over multiple elections, whereas Section 5 preclearance offers a timely remedy. Second, even after courts find Section 2 violations, jurisdictions often persist in enacting discriminatory laws and engaging in discriminatory practices.

B. Case Studies

Three recent case studies involving amici demonstrate these points. In *United States v. Charleston County*, amicus curiae Armand Derfner was an attorney for the private plaintiffs (who are also amicus curiae). In the *Dillard* cases, amici curiae Ed Still and James Blacksher were plaintiffs' counsel in *Dillard v. Chilton County* and *Dillard v. Crenshaw County*. In *Moore v. Beaufort County*, amicus curiae Anita Earls was plaintiffs' counsel

Although the tactics of the defendants in these cases may appear to be relics of the 1960s and 1970s, they are typical responses by contemporary jurisdictions to Section 2 litigation. *Compare* S. Rep. No. 94-295, at 16-17 (1975) ("Measures [to dilute minority voting strength] may include switching to at-large elections, annexations of predominantly white areas, or the adoption of discriminatory redistricting plans.") *with* H.R. Rep. No. 109-478, at 36 (2006) (noting the

persistent use of vote dilution schemes such as "enacting discriminatory redistricting plans; . . . enacting discriminatory annexations and deannexations . . . and changing . . . single member districts to at-large voting and implementing majority vote requirements"). These cases reveal why the course of voting rights litigation under Section 2 is too pockmarked with pitfalls and detours to provide the only road to vindication for disenfranchised minority voters.

A fourth case, *Tangipahoa Citizens for Better Government v. Parish of Tangipahoa*, demonstrates how Section 5 and Section 2 can work in concert to prevent abuses in their infancy.

1. *Charleston County*

Prior to 2004, Charleston County, South Carolina's nine-member County Council was elected under an at-large, partisan voting system. *Charleston County*, 316 F. Supp. 2d at 274. Because Section 5 did not apply to this voting system, Section 2 was the only recourse for minority voters seeking to challenge it. In 2004, that at-large system was dismantled by a judgment that the system resulted in racial discrimination in violation of Section 2 of the Voting Rights Act. The successful Section 2 suit was prosecuted over three years, but voters had been fighting the practice, unsuccessfully, for over a decade longer.

The lawsuit that ended the discriminatory at-large system was not the first one brought by minority voters. Two earlier federal court challenges were

brought in the 15 years prior to *Charleston County*. *NAACP v. Charleston County*, Civ. No. 2:89cv00293 (D.S.C. 1989); *Gadson v. Howard*, Civ. No. 2:94cv01164 (D.S.C. Aug. 15, 1995). Finally, the ultimately successful suits—one filed by the United States and one by private plaintiffs—were brought at the beginning of 2001, and continued until this Court denied certiorari nearly four years later, in November 2004. 543 U.S. 999 (2004). In the interim, the 2002 elections took place under the system later adjudged to be illegal. Because the County insisted on moving for a stay (which was denied), the 2004 elections came within a hair of being held under a discriminatory system as well. *See* Order at 2, *Charleston County*, C.A. No. 2:01-562-23 (D.S.C. March 4, 2004) (denying defendants' motion for stay). Of course, there were many more elections held under this illegal system between the 1989 challenge and the 2004 decision. Each of these elections carries a pall of discrimination that could have been remedied, but for the pains and costs of lengthy Section 2 litigation.

Remarkably, the *Charleston County* story did not end with the district court's invalidation of the County Council's at-large election format in 2003. In defiance of the Court's decision, the South Carolina General Assembly enacted a law adopting an identical partisan at-large election format for the Charleston County School Board. *See* Letter from R. Alexander Acosta, Assistant Attorney Gen., U.S. Dep't of Justice to C. Havird Jones, Jr., Senior Assistant

Attorney Gen., S.C. Attorney Gen. (Feb. 26, 2004) ("Acosta Ltr.").[3]

Prior to the *Charleston County* decision, the school district used a non-partisan, at-large system with no majority requirement, which had allowed several minority candidates to win board seats. *See id.* By contrast, the partisan, at-large format that the court in *Charleston County* had invalidated, and which the South Carolina General Assembly sought to adopt for the school board, created "a de facto majority vote requirement [that] makes it more difficult for the African-American community to employ a traditional strategy of bullet voting in order to improve their chances of electing candidates of their choosing." *Charleston County*, 316 F. Supp. 2d at 294.

Fortunately, the new school board law was subject to preclearance. Without Section 5, minority voters would have had to pursue yet another lengthy and costly Section 2 suit. The school district would have been free to delay the vindication of plaintiffs' rights and stave off a judgment by spending taxpayer dollars to manufacture arguments to distinguish this case from the County Council case. The Attorney General interposed an objection to this clear violation, thereby stopping the General Assembly's attempt at imposing a discriminatory system before it had any effect. *See* Acosta Ltr., *supra*.

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[3] *Available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_022604.php.

2. The *Dillard* Cases

In the 1986 case of *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986), a federal court found that, for a century, the Alabama State Legislature had purposefully switched from single-member to at-large election of local governments and enacted "numbered place" and "anti-bullet voting laws" in the 1950s and 1960s to prevent black voters from electing their candidates of choice. *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1461 (M.D. Ala. 1988). Based on that finding, the District Court expanded the case to include a defendant class of 183 cities, counties, and county school boards that were using such systems. *Id.*

In 1988, in one spinoff case, the Chilton County Commission admitted that its at-large voting system violated Section 2, and entered into a court-approved settlement that temporarily increased the number of commissioners from four to seven and incorporated "cumulative voting" into the Commission's at-large format. *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870 (M.D. Ala. 1988), *aff'd*, 868 F.2d 1274 (11th Cir. 1989). According to the consent decree, this temporary system was to remain in place until the state legislature passed a system, recommended to it by the Chilton County Commission, that could be precleared under Section 5. *See* Consent Decree at 1, *Dillard v. Chilton County Comm'n*, CA No. 2:87-1179-T (M.D. Ala. June 23, 1988).

The new cumulative voting system that plaintiffs obtained through hard-fought and costly Section 2 litigation remained in place for fifteen years; however, the Commission neglected its promise to pass a resolution proposing a new, valid election system. In 2002, another *Dillard* jurisdiction successfully challenged a court-ordered expansion of its county commission to which the County had not consented. *Dillard v. Chilton County Comm'n*, 447 F. Supp. 2d 1273, 1275 (M.D. Ala. 2006) (citing *Dillard v. Baldwin County Comm'n*, 222 F. Supp. 2d 1283 (M.D. Ala. 2002), *aff'd*, 376 F.3d 1260 (11th Cir. 2004)). Seizing on the *Baldwin County Commission* decision, an all-white group sought to intervene in the *Chilton County* case. It asked the court to invalidate the 1988 settlement, contending that in spite of the County's explicit agreement to the consent decree, it could not be enforced if "a remedy to which the state agreed exceeded what a federal court could have imposed had the case gone to trial." James Blacksher, et al., *Voting Rights in Alabama: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 249, 263 (2008); *see Dillard v. Chilton County Comm'n*, 447 F. Supp. 2d at 1275; *Dillard v. Chilton County Comm'n*, 452 F. Supp. 2d 1193, 1196 (M.D. Ala. 2006).

Although the intervenors' position was "contrary to Supreme Court precedent . . . the district court kept the issue under submission for over a year, [and t]he Alabama Attorney General, instead of urging the district court to uphold the state's 1988 agreement, first sided with the white intervenors, and then

withdrew from any participation in the matter." Blacksher, et al., *supra*, at 263. In 2003, the intervenors pressured the County Commissioners into adopting a resolution urging the passage of a local act restoring the discriminatory election format that the Commissioners, the plaintiffs, and the district court had all agreed violated Section 2 *fifteen years earlier*. *Id.* Indeed, "without the protections of Section 5 of the Voting Rights Act, some white-majority state and local governments in Alabama will bow to pressure from their white constituents and return to the racially discriminatory election practices of the past." *Id.* at 263-64.

Wielding its preclearance authority under Section 5, the Attorney General's office was able to thwart the Chilton County Commission's attempt to return to the at-large system that the court had found was born of racial animus. *See id.* at 263; Letter from Joseph D. Rich, Chief, Voting Section, Civil Rights Div., Dep't of Justice, to John Hollis Jackson & Dorman Walker (Oct. 29, 2003). As Bobby Agee, Chilton County's first black commissioner since reconstruction,[4] noted in the aftermath of the case, "[w]e would be having a totally different conversation if [Section 5] didn't exist.... [It's a] very important protection. We would have been at ground zero without

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[4] David T. Canon, *Race, Redistricting, and Representation* 260 (1999).

Section 5." Blacksher, et al., *supra*, at 264.[5] If not for Section 5, black voters today would be shut out of county commission office in Chilton County, *twenty years* after their successful Section 2 suit, 40 years after the 1965 Voting Rights Act, and 135 years after the passage of the Fifteenth Amendment.

3. *Beaufort County*

In 1988, no black candidate had been elected to the Beaufort County Board of County Commissioners for over thirty years, despite the county's black voting age population of approximately thirty percent. *Moore v. Beaufort County*, 936 F.2d 159, 160 (4th Cir. 1991). In April 1988, black voters filed a complaint in federal court seeking to change the Board's at-large, residency district-based election format. *Id.* After obtaining a preliminary injunction, the plaintiffs were able to engage in negotiations and ultimately, in 1989, reach a settlement agreement changing the method of election to one providing an opportunity to elect candidates of choice to two out of seven seats on the board. *Id.* at 160-61. Shortly after finalizing this

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[5] The *Dillard* cases are a perfect example of the need for Section 5 preclearance to ensure that court-ordered remedies from Section 2 cases are not watered-down or ignored. The court's order—to replace 189 unlawful at-large election systems—could not conceivably have been enforced through case-by-case litigation alone. The court's remedy, to have new systems precleared under Section 5, was the only workable solution. Blacksher et al., *supra*, at 264.

agreement, however, the defendant county commissioners reneged on the agreement. *See id.* at 161. The plaintiffs had no choice but to sue. Two years later, in June 1991, the Fourth Circuit Court of Appeals enforced the original settlement agreement. *Id.* at 161-62, 164.

As in *Charleston County* and *Dillard v. Chilton County*, the threat of discrimination in *Moore* did not end with a court's ruling in a Section 2 case. Ever since the settlement was enforced, African-Americans have elected candidates of choice to the Board of County Commissioners.[6] However, some members of the Board have repeatedly sought to eliminate the use of limited voting, which, combined with staggered terms and a seven-member board, provides black voters the opportunity to elect their candidates of choice.[7] Fortunately, because Beaufort County is covered under Section 5, any proposed change is subject to the non-retrogression requirement and no such proposals have been successful. *See* note 7, *supra*. In Beaufort County, Section 2 put a fair method of election in place (albeit allowing the defendants to continue the unlawful practice for three years after they reneged on the agreement), and

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[6] *See* Jonathan Clayborne, *Closed Session Acts May Have Lasting Impacts*, Wash. Daily News, March 16, 2005, *available at* http://www.wdnweb.com/articles/2005/03/16/news/news03.txt.

[7] *See* Jonathan Clayborne, *Board Tackles Limited Voting*, Wash. Daily News, Feb. 10, 2006, *available at* http://www.wdnweb.com/articles/2006/02/10/news/news03.txt.

Section 5 ensured that no hard-fought progress is lost.

4. *Parish of Tangipahoa*

The Tangipahoa Parish redistricting case shows how Section 2 and Section 5 enforcement work together to produce timely results for jurisdictions and voters alike. *See Tangipahoa Citizens for Better Government v. Parish of Tangipahoa*, No. Civ.A.03-2710, 2004 WL 1638106 (E.D. La. July 19, 2004). In September 2003, a group of Tangipahoa Parish citizens filed a Section 2 suit challenging that year's redistricting plan on the grounds that it failed to provide appropriate representation to its African-American residents. *Id.* at *1. By November 2003, the Parish had submitted and been denied preclearance for both its original map, and a subsequent revised map. *Id.* Upon receiving two objection letters, the Parish designed an amended plan to address the Attorney General's concerns and held three public hearings on the new plan, which was precleared in January 2004. *Id.* The district held special elections under the precleared plan in March, a mere seven months after the filing of plaintiffs' Section 2 complaint. *Id.* at *2. Section 5 protected minority voters before any election took place under the discriminatory system.

Compare this experience to that of voters in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991), a case that arose in a jurisdiction not covered by Section 5.

There, the shortcomings of Section 2 litigation are pronounced. The District Court found that the County

> had engaged in intentional discrimination in redistrictings that it undertook in 1959, 1965 and 1971 . . . [and] that the 1981 redistricting was calculated at least in part to keep the effects of those prior discriminatory reapportionments in place, as well as to prevent Hispanics from attaining a majority in any district in the future.

Id. at 767. The plaintiffs suffered eight years of illegitimate elections until they were able to litigate the case in federal court under Section 2.

II. Few Plaintiffs Have The Capacity To Bring Section 2 Cases Because They Are Complex And Expensive, And Few Private Practitioners Are Willing To Take Them

Without the bulwark of Section 5, the burden of challenging discriminatory voting changes will fall upon economically disadvantaged minority voters and already overburdened voting rights lawyers. The types of cases generally pursued under Section 2—challenges to discriminatory redistricting plans and methods of election—are extraordinarily complex and take significant resources to pursue. Moreover, most of the voting changes will not be spread out over time, but will be concentrated in the immediate aftermath of the post-census redistricting in every state, county, and city in the covered jurisdictions, thus straining

the resources of the few lawyers who represent plaintiffs in Section 2 cases. Consequently, voters will only be able to obtain counsel and secure the necessary funding to challenge a tiny percentage of the new flood of discriminatory practices that would result from the elimination of Section 5.

A. The Complex And Expert-Intensive Nature Of Section 2 Lawsuits Mean They Are Costly For Parties And The Courts

"Voting suits are unusually onerous to prepare." *Katzenbach*, 383 U.S. at 314. Section 2 lawsuits are widely recognized as among the most complex, fact-intensive, time-consuming, and expensive federal cases to bring and to litigate. As this Court explained in 1966, one reason that Section 2 litigation is ineffective is because such suits "sometimes requir[e] as many as 6,000 man-hours [and are] exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings." *Id.*; *see also id.* at 315 (Section 5 justified because "[f]our years [of litigation] is too long. The burden is too heavy—the wrong to our citizens is too serious" to rely solely on litigation) (quoting H.R. Rep. No. 439, 89th Cong., 1st Sess., at 11 (1965)); *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997) (Section 5 necessary because of "the slow, costly character of case-by-case litigation"); Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right To Vote*, 49 How. L.J. 741, 747 (2006). This level of complexity frequently requires thousands of hours of

attorney time, the extensive use of expert testimony, and considerable judicial resources.

Since 1993, the Federal Judicial Center has compiled statistics on the amount of time and effort required by 63 types of cases in the federal courts. *See* Fed. Judicial Ctr., *2003-2004 District Court Case Weighting Study: Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States* 9 (2005). The Federal Judicial Center study identifies voting rights cases as the sixth most time consuming, just ahead of civil antitrust cases. *Id.* at 60 fig. 4. According to the study, voting rights cases require nearly four times the judicial resources of the median district court case. *Id.*

Section 2 suits are no less resource intensive for the parties and their counsel, as *Charleston County* illustrates. That case resulted in a six-week trial (excluding post-trial briefing), conducted only after proceedings before a magistrate judge and an unsuccessful mediation by a senior district court judge. *See* U.S. Dist. Ct. D.S.C. (Charleston), Civil Docket for Case No. 2:01-cv-00562-PMD. After the district court's 75-page opinion finding a Section 2 violation, there were further, lengthy proceedings to establish a remedy, followed by costly proceedings necessitated by the County's insistent and repeated efforts to gain a stay or modify the judgment. *Id.* In this single case, defendants spent approximately $2,000,000 in fees and costs, including more than $100,000 in expert witness fees. *Voting Rights Act: An Examination of*

the Scope and Criteria for Coverage Under the Special Provisions of the Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 85 (2005) (statement of Armand Derfner, Voting Rights Attorney). Lawyers at a limited-budget nonprofit organization and a private practitioner in a two-person law firm collectively spent nearly 1800 hours representing private plaintiffs. Order at 12, *Charleston County*, No. 2:01-cv-00562 PMD (D.S.C. Aug. 8, 2005). Furthermore, the Plaintiffs also had the benefit of the Justice Department's involvement, and the resources of the federal government to help shoulder the burden of prosecuting the case.

The fees and hours demanded by *Charleston County* are hardly unique among Section 2 cases. To illustrate the point, each of the following awards is adjusted for inflation.[8] In *Major v. Treen*, 700 F. Supp. 1422, 1428 (E.D. La. 1988), plaintiffs' attorneys worked on a contingent-fee basis, and devoted over 2,500 hours to representing disadvantaged black residents of New Orleans in a successful challenge to Louisiana's congressional redistricting. *See id.* at 1428, 1435. The District Court noted that the state's attorneys likely spent as much time on the case as plaintiffs' counsel. *Id.* at 1430 n.5. Although plaintiffs were ultimately awarded attorneys' fees in the amount of $335,864.15 and costs of $50,740, the

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[8] All figures adjusted for inflation using the Bureau of Labor Statistics inflation calculator, *available at* http://data.bls.gov/cgi-bin/cpicalc.pl.

dispute over fees continued for five years after the case was decided on the merits. *Id.* at 1453. In *Harper v. City of Chicago Heights*, Nos. 87 C 5112 88 C 9800, 2002 WL 31010819 (N.D. Ill. Sept. 6, 2002), the district court, in an opinion awarding plaintiffs' attorneys $385,661.84, noted that the case had "spanned over a decade and, as the 600 plus entries on the docket sheet reflects [sic], was hard fought on both sides." *Id.* at *3. Further examples are legion. *See, e.g.*, *Bone Shirt v. Hazeltine*, 524 F.3d 863, 864 (8th Cir. 2008) (denying plaintiffs recovery of expert witness fees, but noting that parties stipulated that the amount of requested expert fees ($59,391.33) was reasonable); *Graves v. Barnes*, 700 F.2d 220, 224 (5th Cir. 1983) (awarding $1,662,313.14 in attorneys' fees); *Cottier v. City of Martin*, No. CIV 02-5021, 2008 WL 2696917 (D.S.D. March 25, 2008) at *5-6 (awarding plaintiffs $541,479 in attorneys' fees for 2,446.61 hours of work, and $56,331 in costs after deducting $45,265.54 in expert witness fees).

B. The Costs Of Section 2 Litigation Are A Serious Bar To Relief From Violations

With the addition of possibly hundreds of Section 2 cases if Section 5 were unavailable, and "[g]iven the miniscule size of the voting rights bar, requiring plaintiffs." and their attorneys to take on such substantial fees and out-of-pocket costs "would quite plausibly leave literally thousands of unconstitutional systems in place." Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights*

and Remedies After Flores, 39 Wm. & Mary L. Rev. 725, 736 (1998). Although attorneys may be paid on a contingency-basis, ethical rules require plaintiffs to pay out-of-pocket for any fees and costs associated with expert witnesses. *See* Model Rules of Prof'l Conduct R. 3.4 cmt. (2004) ("The common law rule in most jurisdictions is that . . . it is improper to pay an expert witness a contingent fee."). As a result, plaintiffs without the means to pay for expert testimony are all but barred from pursuing Section 2 litigation. *See, e.g.*, Karlan, *Two Section Twos*, *supra*, at 736 ("The cost of proving what turned out to be a blatant series of constitutional violations [in *Mobile v. Bolden*] was staggering: The black plaintiffs' lawyers logged 5,525 hours and spent $96,000 in out-of-pocket expenses, which were exclusive of expenses incurred by Justice Department lawyers after the department intervened in support of the Plaintiffs and the costs of expert witnesses and paralegals.") (citation omitted).

As a result, in most covered jurisdictions, Section 5 objections have more significantly promoted progress in fair voting practices than Section 2 litigation. For example, only two of Mississippi counties' redistricting plans changed as a result of reported Section 2 lawsuits without any Section 5 objections. Robert McDuff, *Voting Rights in Mississippi, 1982-2006*, at 17 (2006) reprinted in *Modern Enforcement of the Voting Rights Act, Hearing Before S. Comm. on the Judiciary*, 109th Cong. 149 (2006) ("*Modern Enforcement: S. Comm. Hearing.*") Without Section 5, the discriminatory redistricting plans initially passed

by the other counties would have prevented the election of most of the 127 African-Americans elected to county boards of supervisors (who come from sixty-seven different counties, forty-three of which incurred one or more Section 5 objections to redistricting plans for supervisors districts). *Id.* "The legal resources did not exist in Mississippi in the past forty years to bring a lawsuit in lieu of every one of the 169 objections that have been issued, and they will not exist in the future." *Id.*

The theoretical availability of court-awarded attorneys' fees is often cited as a mitigating factor in the burden on plaintiffs; however such recovery has often been seriously incomplete and tenuous.[9] While the defendant could freely use taxpayer funds to retain the best counsel it can find anywhere in the country, at any expense, plaintiffs' counsel who prevail may be denied adequate payment. *See, e.g.*, *Arbor Hills Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 193-94 (2d Cir. 2007) (holding that plaintiffs' New York City counsel could

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[9] For example, until the 2006 Amendment to the Voting Rights Act, prevailing plaintiffs could not recover for the expenses of their expert witness. *W. Va. Univ. Hosp. v. Casey*, 499 U.S. 83, 97 (1991). This was quite serious as expert testimony has increasingly become the focus of voting cases. *See* Wendy K. Tam Cho & Albert H. Yoon, *Strange Bedfellows: Politics, Courts, and Statistics: Statistical Expert Testimony in Voting Rights Cases*, 10 Cornell J. L. & Pub. Pol'y 237, 252 (2001) (noting that voting rights cases require particularly complex statistical analysis due to the *Gingles* framework).

only recover at far-lower Albany rates). Moreover, a plaintiff whose goals are achieved without a court order is not a prevailing party entitled to attorneys' fees under 42 U.S.C. § 1988. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603-07 (2001). Thus, if a defendant realizes during the midst of litigation or on the eve of trial that it is facing likely defeat, it may be able to avoid paying attorneys' fees by unilaterally withdrawing the challenged practice. *See generally* Brian J. Sutherland, *Voting Rights Rollback: The Effect of* Buckhannon *on the Private Enforcement of Voting Rights*, 30 N.C. Cent. L.J. 267, 277-88 (2008) (arguing that defendants in voting rights cases may strategically render plaintiffs' claims moot so as to deny them an award of attorneys' fees). By that time, the bulk of plaintiffs' effort and expense has already been incurred. Thus, a unilateral withdrawal may simply (and may be intended to) deprive plaintiffs' attorneys of fees.

C. The Lack Of Available Attorneys To Litigate Cases Is A Barrier To Additional Section 2 Litigation

Even if most minority voters could afford to sue, many voting rights abuses might not be prosecuted at all due to the severe dearth of voting rights practitioners in the private bar. "It is well-settled that civil rights cases, particularly those that are controversial and those that are based on contingent fees, are often not desirable to attorneys." Order at 11, *Moultrie v.*

Charleston County, No. 2:01-cv-00562-PMD (Aug. 8, 2005); *see e.g.*, *Cottier*, 2008 WL 2696917, at *5 ("Plaintiffs have produced evidence that they were unable to find members of the local bar who would represent them. In addition, [plaintiffs' lead attorney] said in his affidavit that he would not have been willing to represent Plaintiffs without the resources and assistance of the ACLU. The cost, complexity and undesirability of this voting rights case forced Plaintiffs to look beyond the South Dakota bar for their attorneys.").

The experience of amici, litigating in their home states, reflects the lack of available attorneys to litigate potential Section 2 cases.[10] Amici know first-hand that

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[10] Although the NAACP Legal Defense Fund, NAACP Special Contribution Fund, the Lawyers Committee for Civil Rights Under Law, the ACLU Southern Regional Office, and MALDEF are able to help on occasional cases, these groups likely have fewer than twenty lawyers combined in their voting rights sections, and have obligations throughout the country that they must meet with finite resources. Their dockets would be overwhelmed far beyond their capacity if Section 5 were abandoned. Amici curiae know of no organizations that have more than five lawyers dedicated primarily to voting rights cases. Given the intense work required by Section 2 cases and deadlines imposed by election dates, these organizations can handle only a small number of cases at any one time. They do not have enough resources to litigate every voting rights abuse in the country. Therefore, Section 2 litigation falls to a few courageous plaintiffs willing to expend the precious time, energy, and resources to back multi-year complex litigation, and the few members of the private bar willing to expend the necessary time and resources on these cases despite the contingent nature of the fees, the unavailability of an enhancement, and the potential

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there are not enough attorneys to address the current demand for Section 2 cases, much less the increase in demand which would result if Section 5 were eliminated.

For example, in North Carolina, while there were between eight and ten attorneys in private practice experienced in voting rights litigation and willing to file such cases during the period between roughly 1986 and 2002, since that time amici's experience shows that the number has dwindled to only one or two. Indeed, institutional plaintiffs brought 45 percent (26 of the 58) of Section 2 cases in North Carolina between 1982 and 2005.[11] *See* Nat'l Comm'n on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act At Work, 1982-2005* (2006) ("*Protecting Minority Voters*"). These resources are hardly unlimited, however, and the more than 50% of cases remaining must be handled by members of the "miniscule" private voting rights bar. Karlan, *Two Section Twos*, *supra*, at 736.

In Mississippi, the attorneys with significant experience handling Section 2 claims who are willing

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that a jurisdiction will evade payment by abandoning the challenged practice at the last minute.

[11] Of those 58 cases, several were filed by attorneys appearing in their capacities as attorneys employed by legal services programs. *Id.* Those attorneys, since 1996, have been barred from "participating in any ... way in litigation related to redistricting." 45 C.F.R. § 1632.3 (2009); *see* 61 Fed. Reg. 63756 (Dec. 2, 1996).

and able to take cases for minority plaintiffs probably number between two and five. Since the last renewal of Section 5, at least 155 potentially discriminatory voting changes in Mississippi were blocked because of Section 5. J.S. App. 70, Map 9.[12] Mississippi's lawyers could have handled no more than a small percentage of those potential cases if Section 2 had been the only recourse. *See* McDuff, *supra*, at 17.

Mississippi lawyers and organizations are able to handle, at most, a handful of cases in any post-census redistricting cycle.[13] Given the deluge of redistrictings not only at the state level, but for county governing boards, school boards, and justice courts in each of Mississippi's 82 counties, as well as city councils in its 274 municipalities,[14] these lawyers could not come

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[12] The opinion of the three judge district court (J.S. App. 1-183) is reported at 573 F. Supp. 2d 221.

[13] One amicus curiae, Southern Echo, works with community groups to use the Section 5 comment process as a means of alerting the United States Department of Justice to discriminatory redistricting plans. Southern Echo: Census and Redistricting, http://southernecho.org/s/?page_id=256. But Southern Echo has no practicing attorneys on staff. Southern Echo: Staff, http://southernecho.org/s/?page_id=55. Other public interest organizations in Mississippi are occupied with other priorities and, like Southern Echo, will not be able to devote much time or money to Section 2 litigation. *See Modern Enforcement: S. Comm. Hearing*, *supra*, at 96 (written responses of Robert B. McDuff, Attorney).

[14] *See Municipal Government in Mississippi* 393 (P.C. McLaurin Jr. & Michael T. Allen eds., 2d ed. 2001), *available at* http://www.mslocalgovernment.org/publications/city/books/2001/index.htm.

close to handling the workload if Section 5 disappeared. It would be impossible for the few available Mississippi lawyers to review more than a handful of cases and bring Section 2 cases challenging discriminatory redistrictings in time to stop those plans from being implemented. This is equally true in other covered states.

In Alabama, James U. Blacksher and Edward Still were two of the three lawyers that represented the plaintiffs in the *Dillard* cases. Each has also represented minority plaintiffs in state-level redistricting cases following the 1980, 1990, and 2000 Censuses. Other than their *Dillard* co-counsel, Larry Menefee (who no longer takes voting cases), there are no lawyers who have represented black plaintiffs or intervenors in any Alabama Section 2 cases since 1995.

D. Due To Their Access To Taxpayer Funds, Jurisdictions Violating Section 2 Do Not Face Similar Burdens, And In Fact Have An Incentive To Stall

In the absence of Section 5, the prospect that official action will be subject to scrutiny is severely diminished. Under a regime where Section 2 litigation is the only enforcement mechanism, officials sometimes have little incentive for voluntary compliance where plaintiffs may lack the resources to fund complex multiyear litigation or no lawyers may be willing to take the case. As Virginia Congressional

Representative Robert Scott noted in the 2005 reauthorization hearings:

> Bringing a section 2 action is very expensive, more than what most voters or small groups may be willing to afford to vindicate their rights. And even if they were able to make a case and be successful, this would be years down the road by the time you take into account the time frame for litigation, including appeals. By then, the winner of the illegal election is an incumbent, and we all know ... that incumbency is a huge and, more often than not, dispositive advantage in an election. So it is clear that if we do not renew this section, we would essentially create a perverse incentive to pass illegal plans with no immediate recourse.

Voting Rights Act: Section 5—Preclearance Standards, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 4 (2005) (statement of Rep. Scott).

Even if a jurisdiction does face a Section 2 suit, officials have all the taxpayers' resources available to defend the challenge. The *Edgefield County School District* case provides an example of the incentives for official intransigence in the face of Section 2 litigation. Edgefield County's County Council at-large electoral scheme was a subject of a 1974 litigation that resulted in this Court's decision in *McCain v. Lybrand*, 465 U.S. 236 (1984), and was "ultimately disposed of 11 years later upon the implementation of a five single-member districts election plan in place of

the at-large system for County Council election." *Jackson v. Edgefield County Sch. Dist.*, 650 F. Supp. 1176, 1189-90 (D.S.C. 1986). But Edgefield County continued to conduct its elections for school board using an at-large method, forcing minority voters to file *another* lawsuit to challenge the same type of election system that was invalidated by this Court. *Id.* Rather than accepting precedent and the rule of law just established in *McCain*, the Edgefield County School District fought the case tenaciously, at great length and cost, before a trial resulted in the election system's invalidation. *Id.* at 1203-04. The judgment required the school board to submit a new election plan and "seek preclearance of such plan and schedule pursuant to Section 5 of the Voting Rights Act." *Id.* at 1204.

The ability to stay in office under an illegal election system, and defend that system at taxpayer expense, creates a further incentive for officials in offending jurisdictions to use all the resources at their disposal to fight these suits to judgment and beyond.

III. Appellant Ignores The Deterrent Effect Of Section 5

In contrast to the perverse incentives created by the cost of Section 2 litigation, Section 5 has an opposite deterrent effect. Appellant attempts to make much of a so-called "vanishingly small number of objections." (Appellant's Br. 52.) However, this mischaracterizes the evidence. The Department of Justice

("DOJ") actually made more objections between 1982 and 2004 than between 1965 and 1982. (*See* NAACP Br. 35.) *See* H.R. Rep. No. 109-478, at 21. And since Section 5 was last renewed in 1982, over 750 Section 5 objections have prevented the implementation of at least 2400 potentially discriminatory voting changes by state and local governments. (Fed. Appellee's Br. 43.) *See also* J.S. App. 70, Map 9. Furthermore, regardless of how Appellant characterizes the absolute number of objection letters, each objection affects thousands, if not hundreds of thousands, of minority voters in covered jurisdictions. Between 2000 and 2006, "Section 5 objections have functioned to aid small as well as large scale elections, shielding as few as 208 and as many as 215,406 voters with a single objection." *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 58-59 (2006) (written responses of Anita S. Earls).

Faced with this data, Appellant claims that the number of objection letters issued as a percentage of total submissions "is more revealing." (Appellant's Br. 52.) However, the percentage of objection letters, or even the large number of letters themselves, fails to tell the whole story concerning the positive deterrent effect of Section 5.

Part of the prophylactic effect of Section 5 comes from what are called "more information request" letters, or MIRs, that are issued by the DOJ. *See Modern Enforcement: S. Comm. Hearing*, *supra*, at 76-77 (written responses of Natalie Landreth, Staff

Attorney, Native Am. Rights Fund, Anchorage, Alaska) ("[T]hese less formal measures give the jurisdiction notice that its activities are being monitored and thus deter that jurisdiction from proceeding in an inappropriate manner. The DOJ does not send objection letters as a knee-jerk reaction and therefore they cannot serve as the only indicator [of a problem]."); *id.* at 25 (statement of Juan Cartagena, Gen. Counsel, Cmty. Serv. Soc'y, N.Y., N.Y.) (state responses to MIRs "demonstrate[] the effectiveness ... of Section 5 objections above and beyond the number of objections issued"). MIRs outnumber objection letters, increasing the number of changes that were not precleared by the DOJ. J.S. App. 65-67 (noting that "in terms of enforcing section 5, MIRs have become nearly as important as formal objection letters.")

Just as important are the changes that never make it to objections because they were made in compliance with the law or never even attempted. H.R. Rep. No. 109-478, at 24. As Congress found, "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." *Id.* It emphasized that Section 5's deterrent effect was "substantial":

> Once officials in covered jurisdictions become aware of the logic of preclearance, they tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result.

Id. (quoting *Protecting Minority Voters*, *supra*, at 57). The submission requirement itself "prevents retrogression and prevents harming minority voting strength and prevents back-sliding, the very types of evils that Congress sought to prevent in passing Section 5." *Modern Enforcement: S. Comm. Hearing*, *supra*, at 8 (2006) (statement of Wan J. Kim, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice); (*see also* Appellee's Br. 11-14.)

Section 5 also provides an incentive for officials to include minority voters and their representatives in contemplated changes that may have an impact on minority voting strength. *See* Pamela S. Karlan, *Section 5 Squared: Congressional Power To Extend and Amend the Voting Rights Act*, 44 Hous. L. Rev. 1, 24 (2007) (noting that Section 5 "increases the minority communities' leverage in demanding accommodation of minority concerns"). For example, when the city of Rocky Mount, North Carolina annexed predominantly white neighborhoods nearby but refused to annex the traditionally African-American community of Battleboro, Battleboro residents were able to use the prospect of a Section 5 objection to preempt this discriminatory policy and gain the benefits of municipal services and the ability to vote in local elections. *See Testimony of Anita S. Earls Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary* (Oct. 25, 2005), 2005 WL 2800039 (F.D.C.H.) ("One of the key factors that led the city [of Rocky Mount] to finally agree to annex this [traditionally African-American] community was the fact

that community members were prepared to vigorously oppose any future annexations of white neighborhoods in the Section 5 preclearance process.")

Other jurisdictions show a desire to comply with Section 5 and appreciate its prospective benefits. Travis County, the covered jurisdiction Appellant contracted to run all of its elections, values its Section 5 coverage because "the County—not to mention its voters—receives benefits from the Section 5 preclearance process. [Section 5]'s valuable educational and deterrent effects aid the County and election officials in administering their multifaceted election duties." (Appellee's Br. 15.) Indeed, "[i]t would undoubtedly prove more costly to the County to litigate a Section 2 case to conclusion ... than to consider and address in advance [the contemplated change] in the process of seeking and obtaining preclearance." *Id.* at 11 (likening Section 5 to "preventative maintenance" of the election system, and Section 2 to "major repairs," and noting that "[i]f ever there were a circumstance where an ounce of prevention is worth a pound of cure," it is in the conduct of free and nondiscriminatory elections).

Similarly, Professor Richard Engstrom, a consultant in redistricting process for State legislators, testified,

> as a consultant who has had a role in drawing maps and the process, that ... section 5 looms seriously over political cartographers

> and decision makers when it comes to plans. And I can testify that I have seen districts changed in order to avoid retrogression and gain preclearance.

Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 31 (2005) (testimony of Richard Engstrom, Professor, Univ. of New Orleans). And in Alaska, DOJ's sole objection had a "dramatic impact" over a decade, and "demonstrates that even a single objection can have a significant impact on the political landscape [statewide] and that the mere prospect of another objection can ensure compliance with the law." *Modern Enforcement: S. Comm. Hearing*, *supra*, at 81 (written responses of Natalie Landreth).

* * *

Section 2 simply cannot replace the protections afforded by Section 5. It cannot stop violations before they happen. Minority voters do not have the resources to litigate every discriminatory practice currently captured by Section 5 preclearance, and there is a dearth of lawyers with the experience and wherewithal to litigate these complex, time-consuming cases. Even when cases are brought under Section 2, discriminatory election systems continue to taint the voting process as the cases wind their way through courts. The Court should not second-guess Congress'

finding that Section 5 is needed to fulfill the Fifteenth Amendment's promise in covered jurisdictions.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-322

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

—v.—

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE CIVIL RIGHTS CLINIC AT HOWARD UNIVERSITY SCHOOL OF LAW, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLEES AND INTERVENOR-APPELLEES

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STATEMENT OF INTEREST

Amici curiae are faculty members at Howard University School of Law and the Supervising Attorney and Student Attorneys of the Civil Rights Clinic at the Law School.[1] We submit this brief in support of the Appellees and Intervenor-Appellees in order to respectfully urge this Honorable Court to uphold the decision of the United States District Court for the District of Columbia.

For one hundred and forty years, through the work of such former and current deans and professors as C. Clyde Ferguson, Jr., James M. Nabrit, Goler Teal Butcher, Lisa A. Crooms, Marsha A. Echols, and Ziyad Motala, among others, Howard University School of Law has long placed the struggle for racial equality in the United States in the broader context of international human rights norms. It is in the spirit of that tradition that *Amici* respectfully submits that the District Court's decision should be upheld because Section 5 of the Voting Rights Act represents a partial fulfillment of United States treaty obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR).

SUMMARY OF ARGUMENT

On September 28, 1966, and October 5, 1977, respectively, the United States signed the Interna-

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of Amicus Curiae's intention to file this brief. All parties have provided consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of the brief.

tional Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR). Nearly twenty years following our signature of the ICERD, the Senate ratified both treaties, first the ICCPR in 1992, and then the ICERD in 1994. As a party to two of the most important human rights documents of the last century, we renewed before the community of nations a promise we had originally made to ourselves at our constitutional founding, and had tried to keep—often faithfully but sometimes only fitfully—through one civil war, several constitutional amendments, and still ongoing social movements: that all human beings, regardless of race, sex, religion or national origin, are equal before the law and are entitled to certain fundamental civil and political rights.

Signing and ratifying these two treaties was not a mere symbolic gesture to celebrate that which we had already achieved. Rather, it was both an implicit concession to the unfinished business of fixing what Justice Thurgood Marshall called "the Constitution's inherent defects,"[2] as well as a fitting acknowledgment of the international roots of the American concept of human equality. Thus, when Congress initially enacted the Voting Rights Act in 1965, and when it reauthorized the Act's pre-clearance provisions in 2006, those legislative actions fulfilled in part our treaty obligations under ICERD and ICCPR to protect the rights of all citizens to vote free from racial discrimination.

Indeed, since legislative passage and reauthorization of the Act, the Executive Branch has

[2] Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harvard L. Rev. 1 (1987).

unequivocally held up the Voting Rights Act to the international community as evidence of our fulfillment of ICERD and ICCPR obligations. This Court has a long tradition of according great deference to the interpretation of treaties by the political branches based on the Court's recognition that it is in the country's best interest to have the government speak with one voice when dealing with other nations, as well as the Court's respect for the particular expertise of those government agencies charged with administering treaties. The present political interpretation of the Voting Rights Act as the fulfillment of our treaty obligations deserves no less a degree of deference and no less a measure of respect.

To submit that among the bases, upon which the Court ought to uphold Section 5 of the Voting Rights Act of 1965, are our commitments to international treaties is not to engage in an academic meditation over the proper role of foreign sources of law in domestic precedent. It is merely to make two points: first, ratified treaties such as ICERD and ICCPR are not foreign sources of law but rather the supreme law of the land, no different from and not inferior to constitutional enactments and federal statutes; and second, whether judged from the founders grounding our political philosophy in the works of European enlightenment thinkers, the abolitionists modeling their anti-slavery appeals on the British abolition movement, or post World War II civil rights activists framing their challenge to Jim Crow segregation as part of the larger anti-colonial struggle of peoples of color in Africa, Asia, and the West Indies, our homegrown notions of liberty and equality have always been from the first and remain to this day deeply inspired by, inextricably intertwined with, and fundamentally inseparable from international norms of human freedom and justice.

ARGUMENT

I.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) AND THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD) ARE PART OF THE SUPREME LAW OF THE LAND, AND IMPOSE AN OBLIGATION UPON THE UNITED STATES TO PROTECT THE RIGHT OF CITIZENS TO VOTE FREE FROM RACIAL DISCRIMINATION

A. Treaties are Part of the Supreme Law of the Land

A treaty is "a compact made between two or more independent nations, with a view to the public welfare." *B. Altman & Co. v. United States*, 224 U.S. 583, 600 (1912).[3] As a solemn expression of national commitment, a treaty "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Edye v. Robertson*, 112 U.S. 580, 598 (1884). Though scholars have long advanced customary international law as a legitimate basis for abiding by treaty commitments[4], American treaty obligations are firmly

[3] *See also Medellin v. Texas*, 128 S. Ct. 1346, 1357 (2008) ("A treaty is, of course, 'primarily a compact between independent nations."); *Edye v. Robertson*, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations."); *Weinberger v. Rossi*, 456 U.S. 25, 29 (1982) ("Under principles of international law, the word [treaty] ordinarily refers to an international agreement concluded between sovereigns.")

[4] Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law* 117 Yale L.J. 550 (2008).

rooted in our own constitutional text and jurisprudential precedent. Article VI, Clause 2 provides that, along with federal constitutional provisions and federal statutes, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." In terms of precedent, since the jurisprudential version of time immemorial, this Court has recognized that treaties are not a lesser species of federal law,[5] and that "[u]nder the Supremacy Clause [of the United States Constitution,] a treaty is 'to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.' " *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 373 (2006) (quoting *Foster v. Neilson*, 27 U.S. 253 (1829)).

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[5] *See Ware v. Hylton*, 3 U.S. 199, 236 (1796) (holding that treaties made by the authority of the United States are superior to the Constitution and laws of individual States); *United States v. Schooner Peggy*, 5 U.S. 103, 109 (1801) (holding that a treaty, affecting the rights of parties litigating in court is to be regarded by the court as an act of Congress); *Fellow v. Blacksmith*, 60 U.S. 366, 372 (1857) (holding that courts are prohibited from using tactics that would work to annul a treaty's effect and purpose in the same manner as they are prohibited concerning acts of Congress); *De Geofroy v. Riggs*, 133 U.S. 258, 266 (1890) (holding that the treaty power is unlimited except for those specific restrictions found within the Constitution); *Maiorano v. Baltimore & O. R. Co.*, 213 U.S. 268, 272-73 (1909) (holding that courts are under an obligation to enforce treaties in litigation involving private rights); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (holding that governmental power over external affairs is vested exclusively in the national government and such powers should be exercised without regard to state laws or policies); *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 181 (1999) (holding that state laws regarding tort liability are unenforceable if they undermine the purpose of the treaty).

B. ICCPR and ICERD are Part of the Supreme Law of the Land And, as such, Impose an Obligation on the United States to Protect The Right of Citizens to Vote Free from Racial Discrimination

The United Nations adopted the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR) in the 1960s.[6] Approximately one year after the passage of the Voting Rights Act of 1965, the United States signed the ICERD. Eleven years later, the United States signed the ICCPR.[7] The Senate provided the advice and consent for ratification of the ICCPR in 1992 and the ICERD in 1994. Since their ratification, the United States has filed periodic reports with and appeared before the Human Rights Committee and the Committee on the Elimination of Racial Discrimination to elaborate on US compliance with its treaty obligations.

The ICCPR envisions that a state party will respect individuals within its territory "without dis-

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[6] International Convention on the Elimination of All Forms of Racial Discrimination, September 28, 1966, 660 U.N.T.S. 195 [hereinafter ICERD or the Race Convention]; and the International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[7] Library of Congress, Thomas, Treaties, *Treaty Number: 95-18, International Convention on the Elimination of All Forms of Racial Discrimination—Legislative History, available at* http://thomas.loc.gov/cgi-bin/ntquery/D?trtys:1:./temp/~trtysn0Kqw8:: (last visited Mar. 22, 2009); Library of Congress, Thomas, Treaties, *Treaty Number: 95-20, International Covenant on Civil and Political Rights—Legislative History, available at* http://thomas.loc.gov/cgi-bin/ntquery/D?trtys:1:./temp/~trtysMt1Fk1:: (last visited Mar. 22, 2009).

tinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR, art. 2, December 16, 1966, 999 U.N.T.S. 171. Specifically, the ICCPR states:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: [. . .] (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors[.][8]

ICCPR, art. 25, December 16, 1966, 999 U.N.T.S. 171.

The Human Rights Committee (HRC) is the body responsible for monitoring implementation of the ICCPR. According to the HRC, Article 25 of the ICCPR "lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant."[9] This article "requires States to adopt such legislative and other measures as may be necessary to ensure that

[8] Article 2 requires that each State that is a party to the treaty must undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR, art. 2, December 16, 1966, 999 U.N.T.S. 171.

[9] U.N. CCPR, *General Comment No. 25: The right to participate in public affairs, voting rights and the right to equal access to public service*, art. 25, U.N.Doc. CCPR/C/21/Rev. 1/Add. 4 ¶ 1 (1994), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument.

citizens have an effective opportunity to enjoy the rights it protects," which includes the right to vote.[10] The right to vote cannot "be suspended or excluded except on grounds which are established by law and which are objective and reasonable."[11] The use of race to deprive citizens of their voting rights is neither objective nor reasonable.

The ICERD is founded on the principle that "all human beings are equal before the law and are entitled to equal protection of the law against any discrimination" and that "the existence of racial barriers is repugnant to the ideals of any human society." *See* Convention on the Elimination of Racial Discrimination, September 28, 1966, 660 U.N.T.S. 195. Specifically, the ICERD requires that:

> State parties. . . prohibit and. . .eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of [. . .] [p]olitical rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage[.]

ICERD, art. 5(c), September 28, 1966, 660 U.N.T.S. 195 [hereinafter ICERD Article 5].

Article 5 of the ICERD "obligates. . .States Parties to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination."[12] As the Committee

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[10] *Id.*

[11] *Id.* at ¶ 4.

[12] U.N. CERD, *Report of the Committee on the Elimination of Racial Discrimination: 51st Session of the General*

on the Elimination of Racial Discrimination has noted, "[a]t the head of these rights and freedoms are those deriving from the Charter of the United Nations and the Universal Declaration of Human Rights," most of which "have been elaborated in the International Covenants on Human Rights,"[13] such as the ICCPR. While "[a]ll States Parties are. . .obliged to acknowledge and protect the enjoyment of human rights, . . .the manner in which these obligations are translated into the legal orders of States Parties may differ."[14] The Committee on the Elimination of Discrimination further notes that "Article 5. . .apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights. The Convention obliges States to prohibit and eliminate racial discrimination in the enjoyment of such human rights."[15]

C The Executive Branch Has Interpreted The Voting Rights Act, and its Pre-Clearance Provisions, As fulfilling in part our treaty obligations under ICCPR and ICERD

In light of the fact that the United States has signed and ratified both the ICCPR and the ICERD, it has an obligation to protect all citizens' right to vote, especially those whose rights might be imper-

Assembly, Supplement No. 18, U.N. Doc. A/51/18, p. 124 ¶ 1 (1996), *see* http://daccessdds.un.org/doc/UNDOC/GEN/N96/257/38/PDF/N9625738.pdf?OpenElement .

13 *Id.*

14 *Id.*

15 *Id.*

iled because of racial discrimination. The Executive Branch has admitted as much in both the documents it has filed with the United Nations Committees overseeing implementation status of ICCPR and ICCPR, Human Rights Committee and the Committee on the Elimination of Racial Discrimination, and its testimony before these two treaty-bodies. The core document filed with the United Nations by the Executive Branch identified the Voting Rights Act of 1965 as supplementing "the constitutional protection afforded by the Equal Protection Clause of the Fourteenth Amendment against discrimination by the state governments on the basis of race, color, or national origin."[16] The initial periodic report filed with the Committee on the Elimination of Racial Discrimination described the Voting Rights Act as including "specialized mechanisms that apply to areas of the country with the most severe history of discrimination against Blacks."[17] The report continued, "[t]his part of the Act requires federal preapproval for any proposed changes in voting laws and practices to prevent the implementation of new discriminatory laws."[18] In addition, as part of the February 2008 hearing before the Committee on the Elimination of Racial Discrimination, high-level members of the Executive Branch characterized the Voting Rights Act as "one of the most effective civil

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[16] Core document forming part of the reports of states parties: United States, U.N. Doc. HRI/Core/USA 2005 (16 January 2006) at ¶ 133.

[17] U.N. CERD, *Reports Submitted by States Parties Under Article 9 of the Convention: Third periodic reports of States parties due in 1999: Addendum:* United States of America, U.N. Doc. CERD/C/351/Add.1 (10 October 2000) at ¶ 95.

[18] *Id.*

rights statutes ever enacted by Congress,"[19] further contending that United States' treaty obligations have been met by, *inter alia*, the Voting Rights Act of 1965 and its subsequent reauthorizations.

Admittedly, when the United States initially signed and subsequently ratified the ICERD and the ICCPR, we did so subject to the declaration that neither treaty was self executing.[20] Thus, the ICERD declaration specifically states "that the provisions of the Convention are not self-executing."[21] *Id.* Likewise, Senate consent to the ICCPR was accompanied by a declaration "that the provisions of Articles 1 through 27 are not self executing." *Id.* S. Res. 4783, 102d Cong., 2d Sess. (1992).[22]

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[19] U.N. CERD, *Seventy-second session Geneva, 18 February-7 March 2008, Questions Put By the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America*, U.N. Doc. CERD/C/USA/6 (2008) at p. 14.

[20] Library of Congress, Thomas, Treaties, *Treaty Number: 95-18, International Convention on the Elimination of All Forms of Racial Discrimination—Legislative Actions, available at* http://thomas.loc.gov/cgi-bin/ntquery/D?trtys:1:./temp/~trtysowwrRK:: (last visited Mar. 10, 2009); Library of Congress, Thomas, Treaties, *Treaty Number: 95-20, International Covenant on Civil and Political Rights—Legislative Actions, available at* http://thomas.loc.gov/cgi-bin/ntquery/D?trtys:1:./temp/~trtys7StCnV:: (last visited Mar. 10, 2009).

[21] The specific declaration adopted by the Senate at the time it ratified the ICERD reads as follows: "the United States declares that the provisions of the Convention are not self-executing." http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=319&chapter=4&lang=en#EndDec (last visited March 2, 2009).

[22] These declarations were among the Reservations, Declarations and Understandings filed with the appropriate treaty-

As interpreted by the Executive Branch, these declarations prohibit "only a private and independent cause of action," unless Congress enacts legislation that grants individuals a justiciable cause of action as a matter of U.S. law." *See* Statement of Conrad Harper, Legal Advisor, United States Department of State, to the United Nations Human Rights Committee, U.N. GAOR Hum. Rts. Comm., 53d Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995).[23] These declarations, however, do not affect the obligations of the United States under either the ICERD or the ICCPR. *See Foster v. Neilson*, 27 U.S. 253, 314-15 (1829).[24]

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body when the ICCPR and the ICERD were finally ratified in 1992 and 1994, respectively. *Id.*

[23] This Court recently reiterated this principle, stating that "a 'non-self executing' treaty does not by itself give rise to domestically enforceable federal law." *Medellin v. Texas*, 128 S.Ct. 1346, 1356 (2008); *see* also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When the [treaty] stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject").

[24] *See* U.N. CERD, *Reports Submitted by States Parties Under Article 9 of the Convention, Third periodic reports of States parties due in 1999*: United States of America, ¶170, U.N. Doc. CERD/C/351/Add.1, 10 October 2000 (The non-self-executing "declaration has no effect on the international obligations of the United States or on its relations with States parties.") http://www.state.gov/documents/organization/100306.pdf ; U.N. CCPR, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Initial Reports of States Parties Due in 1993* Addendum, United States of America, ¶8, U.N. Doc. CCPR/C/81/Add. 4 (24 August 1994). (The non-self-executing "declaration did not limit the international obligations of the United States under the Covenant.") http://daccessdds.un.org/doc/UNDOC/GEN/G94/187/90/PDF/G9418790.pdf?OpenElement;)

In fact, in each periodic report the United States has filed and defended since ratifying both the ICCPR and the ICERD, the Executive Branch has reported that its treaty obligations to protect voting rights are enforced through, *inter alia*, the Voting Rights Act of 1965. The State Department, charged with the duty to report to the appropriate committee about domestic efforts to implement the ICCPR and the ICERD, has contended that the Voting Rights Act of 1965 and the corresponding Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006 are constitutionally valid measures that make enforceable the voting rights provisions found in the ICERD and the ICCPR. While reviewing the federal laws to ensure compliance with its treaty obligations, the State Department reported that: "In 1965, Congress had passed the Voting Rights Act, which prohibited discrimination by public officials in the voting process. [The Voting Rights Act] accelerated the participation of African-Americans in the political and electoral process, particularly in the South." U.N. CERD, 59th Sess., 1474 mtg. at ¶12, U.N. Doc. CERD/C/SR.1474 (May 22, 2003). The State Department explained that Section 2 of the Voting Rights Act protects people from discrimination to the right to vote since the right "may be enforced by a private suit to vindicate denials of the Fifteenth Amendment rights, i.e. intentional denials or limitations on the right to vote or to exercise an effective vote." U.N. CCPR, *Reports Submitted by State Parties Under Article 40 of the Covenant: First periodic reports*, ¶98, U.N. Doc. CCPR /C/81/Add.4 (August 24, 1994).

Furthermore, in a 2008 report, the State Department specified that Section 5 of the Voting Rights Act protects its citizens from racial discrimination:

> Section 5 of the Voting Rights Act freezes changes in election practices or procedures in certain states until the new procedures have been determined not to have a discriminatory purpose or effect either by a special federal court panel or the Attorney General of the United States. This requires proof that the proposed voting change does not deny or abridge the right to vote on account of race, color, or membership in a language minority group. If the jurisdiction is unable to prove that the proposed change is free of a discriminatory purpose or effect, the federal court will deny the requested judgment, or in the case of administrative submissions, the Attorney General will object to the change, and it remains legally unenforceable.

- *See* U.N. High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, *Written Replies to the Questions Put By the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America*, Answer to Question 4, p. 16, U.N. Doc. CERD/C/USA/6 (March 7, 2008). In sum, according to our own State Department, which represents the views of the President, the pre-clearance requirement of Section 5 functions to enforce the United States' obligation to secure the right to vote under both the ICERD and the ICCPR.

The United Nations views the United States' implementation of the Voting Rights Act as fulfilling its treaty obligations and giving force to the ICERD and the ICCPR. During its first appearance before the Human Rights Committee to assess United States compliance with the ICCPR, the Human

Rights Committee remarked on the importance of the Voting Rights Act within the United States. According to the Committee,

> [t]he right to vote, enshrined in articles 25 and 27 of the [ICCPR], was at the core of American democracy. The Fifteenth Amendment to the Constitution prohibited the denial of voting rights on account of race, colour or previous condition of servitude and the Voting Rights Act of 1965 and its amendments authorized the Civil Rights Division and private parties to file lawsuits in cases of violation. The Act also banned literacy tests and other devices used to disqualify minority voters. The Civil Rights Division accorded top priority to ensuring that all Americans enjoyed the right to vote.

See U.N. CCPR, 53th Sess., 1401 mtg. at ¶21, U.N. Doc. CCPR/C/SR.1401 (April 17, 1994). Recently, in a 2007 report to the United Nations, the Executive Branch announced that, in July 2006, Congress reauthorized the Voting Rights Act for 25 years, which includes an extension of the pre-clearance requirement in Section 5. *See* U.N. CERD, *Reports Submitted by State Parties Under Article 9 of the Convention: Sixth periodic reports*, ¶199, U.N. Doc. CERD/C/USA/6 (May 1, 2007); *see also* U.N. CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding observations of the CERD Committee*, ¶2, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

II

THE POLITICAL INTERPRETATION THAT OUR ICCPR AND ICERD OBLIGATIONS ARE FULFILLED IN PART BY THE VOTING RIGHTS ACT IS A LEGITIMATE BASIS UPON WHICH TO UPHOLD SECTION 5 BECAUSE THE COURT HAS TRADITIONALLY ACCORDED GREAT DEFERENCE TO CONGRESS AND THE PRESIDENT ACTING INDEPENDENTLY OR IN CONCERT TO MAKE, IMPLEMENT, INTERPRET, OR ENFORCE TREATIES

Because treaties, like constitutional provisions and federal statutes, stand as supreme federal law, their interpretation ultimately rests with the Court. *See United States v. Schooner Peggy*, 5 U.S. 103, 109 (1801). Over two hundred years ago, Justice Marshall made it clear that the judicial power vested in the United States Supreme Court "extends to. . . treaties. . . ." *Id.* As recently as three years ago, the current Court maintained "if treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court.' " *Sanchez-Llamas v. Oregon*, 543 U.S. 331, 353-54 (2006) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)); *Williams v. Taylor*, 529 U.S. 362, 378-79 (2000) (opinion of Stevens, J.) ("At the core of [the judicial] power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law"); *Hoffmann-*

La Roche Inc. v. Sperling, 493 U.S. 165, 175 (1989), *citing Osborn v. Bank of the United States*, 9 Wheat. 738, 819 (1824) (where a "case or controversy" exists, ("[Art. III, § 2, cl. 1] enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it.").

However, the fact that juridical power extends over treaties does not mean that courts may "go behind [a properly executed and ratified treaty] for the purpose of annulling its effect and operation, than they can behind an act of Congress." *Fellows v. Blacksmith*, 60 U.S. 366, 372 (1856); *see also United States v. Old Settlers*, 148 U.S. 427, 466 (1893) (holding that the Court may not declare a treaty inoperative on grounds of fraud or duress because partaking in such deliberations goes behind a treaty and is "not within the province of a court."). Rather, when exercising its power to determine the interpretation of treaties, the Court has traditionally accorded great deference to the political branches, explaining that "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).[25]

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[25] See also *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921) ("While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight."); *United States v. Curtiss-Wright Export*

This deferential stance toward political administration of treaties is grounded in the Court's recognition that it is in the country's best interest to have the government speak with one voice in dealing with other nations, as well as the Court's respect for the particular expertise of those government agencies charged with treaty negotiation, ratification, implementation and enforcement. *See Sullivan v. Kidd*, 254 U.S. 433, 442 (1920); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184 (1982); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999).[26] Thus, judicial

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Corp., 299 U.S. 304, 321 (1936) ("The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information 'if not incompatible with the public interest.' A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned."); *Sumitomo Shoji Am v. Avgliano*, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight"); *O'Connor v. United States*, 479 U.S. 27, 32-33(1986) ("In determining the proper construction of an agreement implementing an article of a treaty, the consistent application of the agreement by the executive branch of the Federal Government is a factor that is entitled to great weight."); *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1993); *El Al Isr. Airlines v. Tsui Yuan Tseng*, 525 U.S. 155,167 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.").

[26] For a comprehensive study of the historical deference this and other federal courts have accorded to political implementation, interpretation, and enforcement (or non-enforcement) of treaties, see Tim Wu, Treaties' Domains, 93 Va. L. R. 571 (2007).

deference to the political branches in the implementation and administration of treaties operates on at least three levels: deference when the executive branch acts to make or interpret a treaty; deference when the legislative branch acts to implement and interpret a treaty; and deference when both political branches act in concert to administer a treaty.

A. The Court Has Traditionally Deferred To the President's Power to Make and Interpret Treaties

The Court has long acknowledged that, consistent with the power vested in the President under Article II of the Constitution, the executive enjoys broad discretion to make treaties. *See Curtiss-Wright*, 299 U.S. at 320 (stating that in the arena of foreign policy the executive branch has a "better opportunity of knowing the conditions which prevail in foreign countries.") As "the sole organ of the nation in its external relations, and its sole representative with foreign nations," the President enjoys "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Id.* This "degree of discretion" extends to the President's power to both make and to interpret treaties, such that when ruling upon the meaning of treaties, the Court has always given great weight to the executive branch's interpretations of our treaty obligations. *See Charlton v. Kelly*, 229 U.S. 447,468 (1913); *see also Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933) (stating that the negotiations and diplomatic correspondence of the contracting parties to a treaty, while not conclusive, should be given great weight.) The Court put it best in *Kidd* when it explained:

> While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight.

254 U.S. at 442.[27]

Thus, in *Sumitomo Shoji America, Inc. v. Avagliano*, in ruling on a claim by a Japanese trading company that pursuant to the Friendship, Commerce, and Navigation treaty between the United States and Japan, it was exempt from discrimination suits brought under Title VII of the Civil Rights Act, the Court relied on the Department of State's interpretation of the treaty. 457 U.S. 176, 184 (1982). The Court explained that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight," *id.* at 184-85, and that "[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpreta-

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[27] *See also Collins v. Weinberger*, 707 F.2d 1518, 1522 (D.C. Cir.1983) ("Courts should defer to such executive actions provided they are not inconsistent with or outside the scope of the treaty."); *United States v. Noriega*, 808 F. Supp. 791,796 (S.D. Fl. 1992) ("The Court acknowledges that conducting foreign policy is generally the province of the Executive branch."); *Iwonowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 486 (N.J. 1999) ("It is evident that the executive branch, the department responsible for negotiating international agreements, considers claims arising out of World War II as falling within the ambit of government-to-government negotiations. The interpretations of the parties to a treaty, while not binding, are entitled to significant weight.")

tion follows from the clear treaty language, [the Court] must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Id.* at 185. Similarly, in *Tsui Yuan Tseng*, in finding, based on the Warsaw Convention, that an airline passenger was not entitled to recovery for an intrusive security search, the Court reasoned that it "has traditionally considered as aids to a treaty's interpretation its negotiating and drafting history. . .and the post-ratification understanding of the contracting parties." 525 U.S. at 156. The court deferred to an amicus curiae brief from the United States government, holding that "the reasonable view of the Executive Branch concerning the meaning of an international treaty ordinarily merits respect." *Id.*

B. *The Court Has Similarly Shown Great Deference to Congress' Power to Implement and Interpret Treaties*

Although the Court has traditionally looked to the Executive Branch as the predominant actor in the domain of treaties, it has also been respectful of and deferential to the power of Congress to implement treaties. *See Foster v. Neilson*, 27 U.S. 253, 314-15 (1829), overruled on other grounds by *United States v. Percheman*, 32 U.S. 51 (1833), ("when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.")

Congressional treaty power primarily resides in two areas. The first area is the advice and consent provided by the Senate for treaty ratification. The second area is congressional discretion to enact

appropriate legislation, thereby choosing how a particular non-self-executing treaty obligation is to be enforced in the United States. Once Congress chooses to enact a statute for purposes of implementing a treaty, the statutory text completely supersedes the treaty regime as a basis for judicial enforcement, such that "a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute." *Baker v. Carr*, 369 U.S. 186, 212 (1962). But, even when Congress has chosen not to enact specific legislation implementing a treaty, federal courts, again deferential to congressional authority, have always looked to the passage of prior legislation as a sign of congressional intent regarding the matter covered by the treaty in question. Certainly, we do not lack examples of courts deferring to prior legislation as a basis for declining to independently enforce subsequent non-self-executing treaty obligations for which Congress has not passed implementing legislation.[28] Indeed, even when Congress appears to act in a manner incon-

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[28] *See, e.g., Beazley v. Johnson*, 242 F.3d 248, 266 (5th Cir. 2001); *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (holding that a right to vote under Article 25 of ICCPR is not an independently enforceable right under U.S. Law); *Heinrich v. Sweet*, 49 F. Supp 2d 27, 43 (D. Mass. 1999) (finding that plaintiffs have adequate domestic remedies for claims of "crimes against humanity"); *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1257 (C.D. Cal. 1999) (holding that the ICCPR does not create a right of private action under which the plaintiff can successfully state a claim); *White v. Paulsen*, 997 F. Supp. 1380, 1387 (E.D. Wash. 1998) (reasoning that "the United States Senate expressly declared that the relevant provisions of the ICCPR were not self-executing when it addressed this issue in providing advice and consent to the ratification"); *In re Extradition of Cheung*, 968 F. Supp 791, 803 n.17 (D. Conn. 1997) (stating that the ICCPR cannot support an extradition defense.).

sistent with a United States treaty obligation, federal courts have nonetheless deferred to congressional treaty prerogative by refusing to assume a separate power on the part of the judiciary to independently enforce treaties. *See, e.g. Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("holding that if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control"); *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.*, 155 F. 842, 843-45, 849 (1st Cir. 1907) (holding that if "Congress has legislated on the topic since the treaty was ratified. . . that subsequent legislation, so far as it expresses any Congressional purpose inconsistent with any claimed construction" of a treaty "that purpose controls"); *Rousseau v. Brown*, 21 App. D.C. 73, 76-77 (1903) (holding a patent treaty nonbinding absent an act of Congress).

C. Deference to the Political Branches is Particularly Apt When the President and Congress Act in Concert

Above and beyond the deference this Court has traditionally accorded to the executive and legislative, acting pursuant to each branch's independent treaty powers, it has shown even greater deference when the political branches act in concert to conduct foreign affairs. More than fifty years ago, the Court made it clear that no greater deference is owed than when the President conducts foreign affairs pursuant to an express or implied authorization of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring). As Justice Jackson wrote,

> When the President acts pursuant to an express or implied authorization of Congress, his

> authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . [An action] executed by the president pursuant to an act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

Id. at 635-36.

Thus, in *Curtiss-Wright*, upon which Justice Jackson relied in his *Youngstown* concurrence, the Court declined to rule on the constitutionality of an executive order, issued pursuant to a congressional resolution, barring the sale of weapons by an American company to a foreign company. 299 U.S. at 319. The court reasoned that, in the arena of foreign affairs, congressional delegation of power to the President should be given great weight. *Id.* The Court came to the same conclusion in *Dames & Moore v. Regan*, when, relying on Justice Jackson's *Youngstown* concurrence, it confirmed the President's authority to order the transfer of Iranian assets, holding that because the President, in conducting foreign affairs, acted "pursuant to specific congressional authorization, [his actions were] supported by the strongest of presumptions and the widest latitude of judicial interpretation." 453 U.S. 654, 674 (1981).[29]

But, even when Congress is less than explicit, judicial deference still attaches to executive treaty interpretation if Congress remains silent in the face

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[29] By contrast, the Court has shown less deference when the political branches appear to be at odds in the area of foreign affairs. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

of actions by the President, committing the United States to a particular treaty regime. *See, e.g. Cook v. United States*, 288 U.S. 102 (1933) (holding that a treaty is not abrogated by the subsequent re-enactment of a law that does not clearly express congressional intent to abrogate the treaty and any doubt as to the construction of the law in relation to the treaty should be deemed resolved by the consistent departmental practice existing before its enactment); *Nagle v. Loi Hoa*, 275 U.S. 475, 481-82 (1928) (concluding that re-enactment of section six of the amended Exclusion Act, with no change, and subject to the provisions of an expired treaty, "must be accepted as a legislative approval of the practical construction the section had received" by the agency charged with regulating immigration.); *TransWorld Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (stating that "[l]egislative silence is insufficient to abrogate a treaty."); *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 492-93 (1931) (contending that "[t]he reenactment of [a] statute by Congress, as well as the failure to amend it in the face of the consistent administrative construction, is at least persuasive evidence of a legislative recognition and approval of the statute as constructed."); *Brewster v. Gage*, 280 U.S. 327, 337 (1930) (stating that "[t]he subsequent reenactment in later Acts of the provision theretofore construed by the department is persuasive evidence of legislative approval of the regulation" and "[t]he subsequent legislation confirmed and carried forward the policy evidenced by the earlier enactments as interpreted in the regulations promulgated under them.")

D. The Political Interpretation that the Voting Rights Act Fulfills in part our ICCPR and CERD Obligations Deserves the Same Deference the Court has Traditionally Accorded to Treaty Interpretation by the Political Branches

Here, the Executive Branch has declared our obligations under both the ICERD and the ICCPR to have been met by, *inter alia*, the Voting Rights Act of 1965 and the 2006 reauthorization of that Act which includes an extension of Section 2 and the Section 5 preclearance provision. Congress has remained silent in the face of these Executive Branch declarations. Consequently, this Court should uphold Sections 2 and 5 of the Voting Rights Act as measures advanced by the Executive Branch as enforcing the obligations under the ICERD and the ICCPR, both of which the United States has decided to treat as non-self-executing treaties. Any other conclusion runs the risk of compromising United States' compliance with these treaty obligations and sending mixed messages to those with whom we have entered into multilateral agreements such as the ICERD and the ICCPR.

III

IT IS FITTING THAT THE VOTING RIGHTS ACT SHOULD BE ONE OF THE BASES FOR MEETING OUR ICCPR AND CERD OBLIGATIONS BECAUSE OUR HOMEGROWN NOTIONS OF EQUALITY HAVE HISTORICALLY BEEN INSPIRED BY INTERNATIONAL HUMAN RIGHTS NORMS

The genius of the American system of constitutional government is not that it emerged fully

mature at our founding, but that our homegrown moral philosophy of civil and political rights has always had a symbiotic relationship with international human rights norms.

Our constitutional government is at its core a realization of the European Enlightenment's conception of the relationship between the individual and the state.[30] Thomas Jefferson was directly channeling John Locke,[31] John Stuart Mill,[32] Immanuel Kant[33] and Jean-Jacques Rousseau[34], among others, when he wrote in the Declaration of Independence: "We hold These truths to be self-evident, that all Men are created equal, that they endowed by their creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."[35]

This vision of the Enlightenment was embodied not just in the Declaration of Independence but was also reflected in both the structure of government

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[30] *See* Alasdair MacIntyre, *After Virtue* 53-55 (2d ed., 1984); Thomas C. Grey, *Do We Have An Unwritten Constitution?*, 27 Stan. L. Rev. 703, 715-16 (1975).

[31] *See* John Locke, *Two Treatises of Government* 271 (P. Laslett ed. Cambridge University Press 1988) (1690).

[32] *See* John Stuart Mill, *On Liberty* 14 (John Gray ed. Oxford Univ. Press 1991) (1859).

[33] *See* Immanuel Kant, *Political Writings* 61, 75 (Hans Reiss ed. & H. B. Nisbet trans., Cambridge Univ. Press 1991) (1793).

[34] *See* Jean-Jacques Rousseau, *Discours sur l'économie politique*, in 3 Jean-Jacques Rousseau, *Ouevres Completes* 239, 263 (Bernard Gagnebin & Marcel Raymond eds., 1964) (1775). For an examination of Rousseau's philosophy and its influence on American constitutionalism, *see* Nelson Lund, *Rousseau and Direct Democracy*, 13 J. Contemp. Legal Issues 459 (2004).

[35] The Declaration of Independence, ¶ 1 (U.S. 1776).

adopted by the Constitution and in its enumeration of individual rights. From a structural perspective, the Constitution embodied "a philosophy of government that was highly protective of individual liberty and manifestly Lockean. Separation of powers between the executive, legislative, and judiciary, with checks and balances built into the system to prevent overweening government or, in the worst case, tyranny, is straight from the classical liberal, Lockean playbook." Ellen Frankel Paul, *Freedom of Contract and the "Political Economy" of Lochner v. New York*, 1 N.Y.U. J. L. & Liberty 515, 535 (2005); *see also* Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (1988). From a rights perspective, the Bill of Rights, as a charter of "negative" liberties, protecting certain areas of individual freedom from state interference, is at bottom a realization of the Enlightenment's idea of placing individual liberty and autonomy at the center of the political universe.[36]

For two hundred years, the international pedigree of our constitutional system was plainly reflected in our jurisprudence. In 1783, Blackstone described the law of nations as "a system of rules, deducible by natural reason and established by universal consent among the civilized inhabitants of the world . . . adopted [in England] in its full extent by the common law, and . . . held to be a part of the law of the land." 4 W. Blackstone, Commentaries 66-67 (reprint 1978). Throughout the Nineteenth and much of the Twentieth Century, this very Court would consistently preserve Blackstone's account such that the

[36] David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886 (1986).

use of international norms to shape and inform domestic law was neither uncommon nor terribly controversial. *See, e.g.*, *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 114 (1784) (held that assault by U.S. citizen on French diplomat constituted a violation of international law, which formed a part of domestic law); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795) (held that international law creates a domestic cause of action in seizure of foreign vessel on international waters); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (used law of nations to examine Virginia statute to confiscate property of British subjects base); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 36 (1801) (held that international law authorized U.S. salvage of Hamburg vessel recaptured from French); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815) (held that international law gave Danish plaintiff cause of action for seizure of property by U.S. defendant); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (held that international law bound U.S. court in contract action between British and Argentine subjects); *Bentzon v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815) (process for determining the law of nations governing belligerent and neutral rights); *The Antelope*, 23 U.S. (10 Wheat) 66 (1825) (used international law to examine illegality of the slave trade); *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1871) (awarded damages against a British vessel for the accidental sinking of an American ship, noting that "no single nation can change the law of the sea."); *United States v. Arjona*, 120 U.S. 479, 487 (1887) (stated that international law imposed a positive obligation upon the United States to punish the counterfeiting of foreign notes.) But perhaps no formulation expressed it bet-

ter than Justice Gray's well known statement in *The Paquete Habana*:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

175 U.S. 677, 700 (1900).

In terms of our struggle for racial equality, almost from the moment the first African slaves disembarked in Virginia in 1669, there arose in the colonies an anti-slavery movement grounded in European Quaker philosophy. *See* Ruth A. Ketrin, *Charles Osborn in the Anti-Slavery Movement* (1937). Thus, in 1657, George Fox, a Quaker leader, published a document titled "To Friends beyond the sea that have Black and Indian Slaves," in which he argued that "all men of earth were of one blood." *See* Herbert Aptheker, The Quakers and Negro Slavery, 25 Journal of Negro History 332 (1940). As the abolitionist movement began to take root, northern blacks argued for American citizenship by pointing out that under international customary law, "the strongest claim to citizenship is birth-pace" and that "in whatever country or place you may be born . . .you are in the first and highest sense a citizen." *This Country Our Only Home*, 1 Colored x American, May 9, 1840. Frederick Douglas challenged the constitutional compromise that denied people of African descent their personhood and citizenship based on natural law and other concepts that were advanced by the philosophers of the European Enlightenment.[37]

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[37] David Brion Davis, *The Emergence of Immediatism in British and American Antislavery Thought*, *in* Articles on American Slavery 85, 85 (Paul Finkelman ed., 1989).

Northern and Southern abolitionists found and cited as inspiration the 1803 slave revolution in Haiti led by the former slave Toussaint L'Ouverture. *See* Robert C. Morris, *Reading, "Riting," and Reconstruction: The Education of Freedmen in the South 1861-1870* 199 (1981).

During the Jim Crow era, intellectuals and activists such as W. E. B. DuBois examined parallels between the struggle for Irish Independence from the British and the African-American struggle for equal rights. *See* Susan M. Glisson, *The Human Tradition in the Civil Rights Movement 80* (2006). These advocates used international mechanisms to pressure the United States government by, *inter alia*, petitioning the United Nations for relief from the laws that maintained the racial segregation of Jim Crow as a matter of constitutional equality. *See* Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1956* 20 (2003). The first such petition to the United Nations Commission on Human Rights was submitted by the National Negro Congress (NNC) on January of 1946. *Id.* In 1947, a supplement to the original draft of the NNC United Nations petition was submitted, expanding the focus from African Americans to all peoples of color in the United States. *Id.* at 89. The supplement also stated how Jim Crow Laws in the United States discriminated against Third World U.N. delegates. *Id.* The supplement concluded that the Negro problem in America was more than an internal problem, but rather had international implications that should be addressed by the world. *Id.* In 1947, the National Association for the Advancement of Colored People (NAACP) filed a petition to the United Nations titled, "An Appeal to the World: A Statement on the

Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United States for Redress." Azza Salama Layton, *International Politics and Civil Rights Policies in the United States 1941-1960* 51 (2000).

These petitions were rooted in notions of freedom, liberty, self-determination and natural rights through international laws, such as the Universal Declaration of Human Rights, on which the United States placed its imprimatur at the close of World War II.[38] Leaders in the civil rights movement of the 1950s and 1960s used human rights norms and standards to state their claims in ways the Constitution seemed unable to comprehend. Whether James Nabrit's use of the Universal Declaration of Human Rights to challenge the continuing constitutionality of segregated public schools in the District of Columbia, or Dr. Martin Luther King, Jr.'s final speech before his death in which he placed the labor struggle of Memphis' black garbage collectors in the broader context of "the human rights revolution," or the statement by Malcolm X that "the day the black man turns from civil rights to human rights, he will take his case into the halls of the United Nations in

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[38] Eleanor Roosevelt, On The Adoption of the Universal Declaration of Human Rights (December 9, 1948) (noting that "[t]he long and meticulous study and debate of which this Universal Declaration of Human Rights is the product means that it reflects the composite views of the many men and governments who have contributed to its formulation. . . . Taken as a whole the Delegation of the United States believes that this is a good document—even a great document—and we propose to give it our full support.") http://www.americanrhetoric.com/speeches/eleanorrooseveltdeclarationhumanrights.htm; *see also* William L. Patterson, *We Charge Genocide: The Crime of Government Against the Negro People* vii (1970).

the same manner as the people in Angola, whose human rights have been violated by the Portuguese in South Africa,"[39] human rights have been an important reference point for those struggling for full personhood and citizenship for all regardless of race, color or creed.[40]

These examples demonstrate the historical tradition of viewing racial justice in America as both a domestic and an international imperative. This custom is made more salient by our government's agreement, by way of signature and ratification, to be bound by treaties such as the ICERD and the ICCPR. That this agreement is subject to conditions is beyond question. What is crucial to the points made in this brief is that assuming, *arguendo*, these conditions are legitimate, then the position advanced by at least two presidents is one that recognizes the Voting Rights Act as crucial to satisfying our treaty obligations under both ICERD and ICCPR.

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[39] Malcolm X, The Leverett House Forum of March 18, 1964, in Malcolm X: Speeches at Harvard 143-44(Archie Epps, ed. 1991)

[40] *See e.g.* James Jennings, *The International Convention on the Elimination of All Forms of Racial Discrimination (CERD): The Inernational Convention on the Elimination of All Forms of Racial Discrimination: Implications for Challenging Racial Hierarchy*, 40 How. L.J. 597 (1997); Gay J. McDougall, *The International Convention on the Elimination of All Forms of Racial Discrimination (CERD): Introduction: Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 How. L.J. 571)(1997); Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 Harv. Hum. Rts. J. 15, 18 (1996).

CONCLUSION

For the foregoing reasons, we pray the Court uphold the decision of the United States District Court for the District of Columbia.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-322

In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,
Appellant,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* SUPPORTING APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

The Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that it guarantees. CAC accordingly has a strong interest in this case and in the scope of Congress's enforcement powers under the Reconstruction Amendments.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For the reasons stated by the Federal Appellee, Intervenor-Appellees, and the District Court, Congress's extension of the Voting Rights Act preclearance provision is well within its constitutional powers.

The Appellees have shown in their briefs that the Act's preclearance provision is constitutional under *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) and *City of Rome v. United States*, 446 U.S. 156 (1980), as well as *City of Boerne v. Flores*, 521 U.S.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund the brief's preparation or submission. The written consent of the Solicitor General accompanies this brief. The remaining parties have consented to the filing of this brief by filing blanket letters of consent.

507 (1997), and its progeny. *See, e.g.*, Br. for the Federal Appellee, at 16-30; Br. for Intervenor-Appellees Texas State Conference of NAACP Branches, et al., at 22-32. As the United States has demonstrated, "both lines of cases agree that where, as here, Congress seeks to enforce a right that is at the core of the protection afforded by the Reconstruction Amendments, this Court's review of the appropriateness of Congress's chosen method of protection is highly deferential." Br. for the Federal Appellee, at 8.

The history and text of the Reconstruction Amendments strongly support the conclusion that Congress acted well within its constitutional authority in enacting the Voting Rights Act extension. A broad range of scholars has recently enriched our knowledge of the text and history of the Fourteenth Amendment's enforcement clause.[2] The history of the Fourteenth Amendment's enforcement clause is particularly important in understanding Congress's

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[2] *E.g.*, Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 Harv. J.L. & Pub. Pol'y 991 (2008); Akhil Reed Amar, *America's Constitution: A Biography* (2005); Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 Fordham L. Rev. 153 (2004); John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* (2002); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 Stan. L. Rev. 1127 (2001); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26 (2000); Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 Yale L.J. 115 (1999); Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999); Michael W. McConnell, *Institutions and Interpretation*, 111 Harv. L. Rev. 153 (1997).

power to enforce the guarantees of the Reconstruction Amendments, as it produced the most extended debate and discussion. *Amicus* CAC thus focuses extensively in this brief on the history of the adoption of the Fourteenth Amendment.

The Congress that considered and adopted the Fourteenth Amendment viewed broad congressional authority as an indispensable lynchpin of the Amendment. The language that the Framers used to define the scope of Congress's authority—"appropriate legislation"—reflected this decision to ensure that Congress would have an ample berth for legislative choices. The drafting history in Congress, ratification debates in State legislatures, and contemporaneous legislative interpretations of Section 5 all reflect an understanding of extensive congressional power and discretion to enforce the Amendment.

The available evidence about the scope of the Fourteenth Amendment's enforcement clause thus points overwhelmingly to the conclusion that Congress has broad authority and discretion under Section 5 of the Fourteenth Amendment and the nearly identical enforcement provision of the Fifteenth Amendment. *See* Br. for the Federal Appellee, at 16 (arguing that the enforcement clauses of the Fourteenth and Fifteenth Amendments were deliberately intended to confer "broad new legislative powers"). Whatever the outer boundaries of this far-reaching power, the Voting Rights Act extension fits comfortably within the Reconstruction Framers' conception that Congress would exercise its experience and expertise to fashion legislative

solutions in furtherance of the Reconstruction Amendments' paramount protections.

ARGUMENT

I. THE TEXT AND HISTORY OF THE FOURTEENTH AMENDMENT'S ENFORCEMENT CLAUSE WERE FORGED IN THE CRUCIBLE OF RECONSTRUCTION

Before turning to the history of the Fourteenth Amendment's adoption, it is important to recognize that the Fourteenth Amendment's enforcement clause was shaped by the country's experience after the Thirteenth Amendment, and that the Fourteenth Amendment, in turn, helped to shape the enforcement power granted under the Fifteenth Amendment.

The Thirteenth Amendment was born out of the Civil War to end the current crisis of slavery and prevent future calamities. Addressing a crowd that gathered around the White House on February 1, 1865, President Abraham Lincoln called the Thirteenth Amendment, sent that day for ratification by the States, a "king's cure" for the evils of slavery that paved the way for "the reunion of all the states perfected and so effected as to remove all causes of disturbance in the future." 8 *The Collected Works of Abraham Lincoln* 254-55 (Roy P. Basler ed., 1953). The Thirteenth Amendment—passed by Congress at Lincoln's urging, ratified by several of the States in his memory—represented a dramatic constitutional departure. While the first eleven amendments to the Constitution all sought to *limit* the power of the federal government, the enforcement clause of the Thirteenth Amendment *added* to federal power in

expansive language, beginning a new constitutional tradition of expanding congressional power to enforce constitutional guarantees. *See* Akhil Reed Amar, *America's Constitution: A Biography* 360-361 (2005).

While achieving President Lincoln's quest to root slavery out of our founding document, the Thirteenth Amendment quickly proved insufficient to secure fully for the nation the "new birth of freedom" Lincoln promised at Gettysburg. 7 *The Collected Works of Abraham Lincoln* 23 (Roy P. Basler ed., 1953). As members of Congress moved to address these problems with the passage of the Civil Rights Act of 1866, they were met by opposition in Congress and a veto by President Johnson on the ground that the Act exceeded Congress's power to enforce the Thirteenth Amendment. *See* Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-77* 250 (1988).

The 39th Congress demonstrated its broad understanding of the enforcement power conferred by the Thirteenth Amendment by passing the 1866 Civil Rights Act over President Johnson's veto—the first time in U.S. history a major piece of legislation was passed over a presidential veto[3]—but this fight crystallized the need for more constitutional change. The Fourteenth Amendment was approved by Congress two months after passage of the 1866 Civil Rights Act to secure both liberty and equality against hostile acts of State and local governments: this new grant of power ended any doubt about the constitutionality of the 1866 Civil Rights Act.

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[3] *See* U.S. Congress, *Presidential Vetoes, 1789-1988*, S. Pub. 102-12, 103rd Cong., 2d Sess., at 1-30 (1992).

Echoing the Thirteenth Amendment's provision that "Congress shall have power to enforce this article by appropriate legislation," U.S. Const. amend. XIII, § 2, the Fourteenth Amendment also gave Congress broad authority to enforce, by "appropriate legislation," the Constitution's new protections for civil and human rights. U.S. Const. amend. XIV, § 5. *See generally* Amar, *America's Constitution*, at 363 (explaining that the people ratified the Thirteenth and Fourteenth Amendments "[k]nowing full well that Congress believed that this language authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality").

The Fifteenth Amendment, passed by the 40th Congress in early 1869 and ratified in early 1870, completed the Constitution's Second Founding that followed the Civil War. With the Fourteenth Amendment having broadly secured civil rights and liberties, the Fifteenth Amendment declared that citizens of the United States have a right to vote that cannot be "denied or abridged . . . on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Like the Thirteenth and Fourteenth Amendments, the Fifteenth Amendment sweepingly declares in its second section that "Congress shall have power to enforce this article by appropriate legislation." *Id.* § 2.

While the three Reconstruction Amendments contain nearly identical enforcement clauses, it is in the debates over the Civil Rights Act of 1866 and the Fourteenth Amendment's enforcement power where our Reconstruction Framers made their intentions absolutely clear. Answering the challenges to federal authority raised by opponents of the 1866 Act, the

Framers of the Fourteenth Amendment stated in no uncertain terms that they were granting Congress the sweeping authority of Article I powers as interpreted by *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *See* Br. for the Federal Appellee, at 17. Accordingly, the text and history of the Fourteenth Amendment inform the meaning of the Fifteenth Amendment's grant of congressional power to enforce the right to vote, as well as the Fourteenth Amendment itself.[1]

II. THE FOURTEENTH AMENDMENT GRANTED CONGRESS BROAD DISCRETION TO CHOOSE APPROPRIATE MEANS FOR PROTECTING CONSTITUTIONAL RIGHTS

The Fourteenth Amendment unmistakably committed the nation to the protection of individual rights, including the right to be free of racial discrimination. As Section 1 proclaims, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor

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[1] As the United States' brief shows, the Court has given *McCulloch*-style deference to enforcement legislation under all three Reconstruction Amendments with respect to measures directed against racial discrimination. Br. for the Federal Appellee, at 19 (citing *inter alia*, *Tennessee v. Lane*, 541 U.S. 509, 561 (2004) (Scalia, J., dissenting)). At the very least, as explained by Intervenor-Appellees, the renewal of the VRA's preclearance provisions is clearly constitutional in light of the specific office and mission of the Fifteenth Amendment. *See* Br. for Intervenor-Appellees Texas State Conference of NAACP Branches, et al., at 22-32.

deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The fifth section of the Amendment announced that Congress would share with the courts the responsibility for giving effect to these fundamental constitutional commitments: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. The congressional debates over the Fourteenth Amendment, the text the Framers chose, the Amendment's drafting history, the ratification debates, and early post-ratification interpretations of the text, all confirm that Section 5 was intended and understood to give Congress wide latitude to select the measures it considered appropriate for the protection of constitutional rights. *See also* Br. for the Federal Appellee, at 16-20.

A. The Framers of the Fourteenth Amendment Sought To Confer Broad Legislative Discretion on Congress To Enforce the Amendment

As the Fourteenth Amendment was debated in Congress, southern States were devising strategies to restrict the freedoms of newly freed slaves and enacting new "Black Codes," aimed at making African Americans second-class citizens. *See* Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. at 64-65. The protections of the Fourteenth Amendment, such as the Equal Protection Clause, provided part of the constitutional response to these renewed threats to racial equality. The Framers of the Fourteenth Amendment, however, were understandably reluctant to leave the judiciary with the sole responsibility for protecting against racial

discrimination and other violations of constitutional rights. In the aftermath of the Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the Framers of the Fourteenth Amendment were determined to give Congress a concurrent power to enforce the constitutional guarantees of liberty and equality.

Against this backdrop, it is no surprise that the congressional debates on the Fourteenth Amendment stressed the importance of a broad federal *legislative* power to protect constitutional rights. The leading proponents of the Amendment, Senator Jacob Howard and Representative John Bingham, delivered important speeches explaining that Congress would have wide latitude to enact "appropriate" measures for protecting constitutional rights.

Introducing the proposed Amendment to the Senate in May 1866, Senator Howard devoted a significant portion of his remarks to Congress's enforcement power under Section 5. *See* Cong. Globe, 39th Cong., 1st Sess. 2764-66 (1866). Howard emphasized the importance of Congress's power to enforce the Amendment. The antebellum Constitution, Howard noted, did not give Congress authority to protect constitutional rights against state infringement. *Id.* at 2765. Though the Bill of Rights was understood to protect individual liberties against federal invasion, these liberties did not fall within "the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers." *Id.* at 2766. Accordingly, Congress lacked authority to give "full effect" to individual liberties.

"while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year." *Id.*

The enforcement clause in Section 5 of the proposed Fourteenth Amendment, Howard declared, would remedy this flaw in the Constitution. "The great object of the first section of this amendment is . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). Without congressional action, however, Section 1's restraints would be ineffectual. It was necessary, if these restraints were "to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end." *Id.* The fifth section of the Amendment gave the legislature precisely this power. "Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." *Id.*

Senator Howard's speech refutes a narrow reading of Congress's power to enforce the Fourteenth Amendment. The enforcement provision, Howard said, conferred "authority to pass laws which are appropriate to the *attainment of the great object* of the amendment." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (emphasis added). Section 5 "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property." *Id.* at 2768. For Senator Howard, the enforcement provision was "indispensable" because it "imposes

upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." *Id.*

The House debates confirmed the breadth and significance of the congressional power to enforce the Fourteenth Amendment's substantive guarantees. Like Senator Howard, Representative Bingham emphasized that Section 5 would bring a fundamental change in the balance of power between the federal government and the States. Cong. Globe, 39th Cong., 1st Sess. 2542 (1866). Immediately after reading the full text of the proposed Amendment to the House, Bingham called attention to the enforcement power. *Id.* "There was a want hitherto," Bingham noted, "and there remains a want now, in the Constitution of our country, which the proposed amendment will supply." *Id.* Before the Fourteenth Amendment, the Constitution failed to recognize "the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do": to enact legislation for the purpose of safeguarding constitutional rights. *Id.*

The statements of several other supporters confirmed that Congress's enforcement power was a vital component of the Fourteenth Amendment. Representative Broomall expressed the point forcefully: "We propose . . . to give power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction. Who will deny the necessity of this? No one." Cong.

Globe, 39th Cong., 1st Sess. 2498 (1866). Representative Miller similarly highlighted, in emphatic terms, that the enforcement power was essential to any constitutional provision that purported to protect rights: "The fifth section gives to Congress the power to enforce the provisions of this article by appropriate legislation. This of course is requisite to enforce the foregoing sections, or such of them as may be adopted, and is too plain to admit of argument; and in fact is not, as I am aware, contested by any gentleman in this House." *Id.* at 2510-11. Congressman Jehu Baker likewise explained that the fifth section of the Amendment was "necessary in order to carry the proposed article into practical effect." *Id.* at App. 257.

The Fourteenth Amendment's opponents also understood Section 5 to confer a broad discretion on Congress to enforce the Amendment's provisions—and, in fact, this broad power was one of the reasons for their opposition to the Amendment. *See* Cong. Globe, 39th Cong., 1st Sess. 2500 (1866) (Rep. Shanklin) (arguing that that the Fourteenth Amendment would "strike down . . . State rights and invest all power in the General Government"); *id. at* 2538 (Rep. Rogers) (objecting that the Fourteenth Amendment would "consolidate[] everything in one imperial despotism"); *id.* at 2940 (Sen. Hendricks) (calling the enforcement clause "most dangerous"). Accordingly, while supporters and opponents of the Fourteenth Amendment parted ways on the merit of the Amendment's broad enforcement power, both sides agreed that the Amendment would provide Congress significant authority to enforce its provisions.

B. The Text of the Fourteenth Amendment Was Intended and Understood To Give Congress Broad Discretion To Enact Appropriate Enforcement Legislation

The Framers of the Amendment chose language that was calculated to give Congress wide latitude to enact legislation for the purpose of securing constitutional rights. As several scholars of the Fourteenth Amendment's history have explained, the phrase "by appropriate legislation" had a specific meaning in 1866—a meaning that gave effect to the expressed wishes of the Amendment's supporters to assign Congress a powerful role to protect against unconstitutional actions. *See, e.g.*, Amar, *Intratextualism*, 112 Harv. L. Rev. at 822-27; McConnell, *Institutions and Interpretation*, 111 Harv. L. Rev. at 178 n.153; Engel, *The* McCulloch *Theory*, 109 Yale L.J. at 131-34.

Had the drafters of the Fourteenth Amendment wanted to grant Congress a more narrowly constrained power to enforce the provision's substantive guarantees, they could have inserted restrictive language into Section 5, or could simply have given Congress the power "to enforce the provisions of this article." Instead, the Framers chose to include in the enforcement provision these words: "by appropriate legislation." This phrase, separated by commas from the rest of the section, might seem at first glance to be superfluous. How else, one might ask, is Congress to enforce the Fourteenth Amendment's commitments to equality and liberty, if not "by appropriate legislation"?

The phrase, however, was not superfluous. To those who drafted, debated, proposed, and ratified

the Fourteenth Amendment, the term "by appropriate legislation" called to mind an expansive vision of federal legislative authority. *See* Engel, *The* McCulloch *Theory*, 109 Yale L.J. at 133-43; *see also* Br. for the Federal Appellee, at 17-18. Under the Supreme Court's classic elucidation of congressional power under Article I, which was well known at the time the Fourteenth Amendment was considered and adopted, Congress was understood to have wide discretion to choose whatever legislative measures it considered "appropriate" for achieving the purposes the Constitution assigned to it. *McCulloch*, 17 U.S. (4 Wheat.) 316, 401-23 (1819). In *McCulloch*, Chief Justice Marshall had laid down the fundamental principle determining the scope of Congress's powers under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421 (emphasis added).

This broad construction of congressional power entailed a deferential role for judicial scrutiny when Congress acted pursuant to an affirmative grant of power. *McCulloch* squarely rejected the substitution of judicial judgment regarding the measures needed to fulfill Congress's duties. For the courts to review the necessity of Congress's chosen measures would be to violate the separation of powers between the Courts and Congress, "to pass the line which circumscribes the judicial department, and to tread on legislative ground." *Id.* at 123. Chief Justice Marshall used the word "appropriate" to describe the

scope of congressional power no fewer than six times. *Id.* at 408, 410, 415, 421, 422, 423.[5]

The Framers of the Fourteenth Amendment were also acutely aware that the pre-Civil War Supreme Court had given a broad construction to Congress's power to enforce what the Court viewed as a constitutional "right" to the return of slaves, as recognized by the Fugitive Slave Clause—one of the few provisions of the antebellum Constitution that limited state action. *See* Kaczorowski, 73 Fordham L. Rev. at 221-30. In *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), the Court upheld the Fugitive Slave Act of 1793. The Act's extensive scheme of civil remedies against private parties who interfered with

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[5] The influential treatise-writers of the age followed *McCulloch*'s understanding of the breadth of congressional freedom to choose "appropriate" measures. The accounts of congressional power authored by Justice Story and Chancellor Kent, for example, were cited repeatedly during the debates over the Reconstruction Amendments. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) (statement of Rep. Bingham) (quoting Story); *id.* at 1118 (statement of Rep. Wilson) (quoting Kent); *id.* at 1292 (statement of Rep. Bingham) (quoting Kent); *id.* at 1294 (statement of Rep. Shellabarger) (quoting Story). Story used the word "appropriate" to emphasize that Congress "must have wide discretion as to the choice of means." 1 Joseph Story, *Commentaries on the Constitution of the United States* 417 (1833) ("[T]he only limitation upon the discretion would seem to be, that the means are *appropriate* to the end. And this must naturally admit of considerable latitude; for the relation between the action and the end . . . is not always so direct and palpable, as to strike the eye of every observer.") (emphasis added). Chancellor Kent likewise invoked *McCulloch* when stressing the importance of Congress's power to adopt any means "which might be *appropriate* and conducive" to a permissible end. 1 James Kent, *Commentaries on American Law* 238 (1826) (emphasis added).

slaveholders' attempts to recapture their "property" was, the Court held, justified as "appropriate" legislation to enforce the entitlements of slaveholders under the Fugitive Slave Clause. *See* U.S. Const. art. IV, § 2, cl. 3. Justice Story expressed this conclusion using language that the Fourteenth Amendment's drafters would later adopt: "the natural inference" from the existence of the right of recapture was that Congress was "clothed with the *appropriate* authority and functions to *enforce* it." *Prigg*, 41 U.S. at 615 (emphasis added). The Court relied on *McCulloch* as authority for the implied enforcement power: "The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end." *Id.* at 619; *see also Ableman v. Booth*, 62 U.S. (21 How.) 506, 517, 526 (1859) (stating that Congress had power to "protect and guard the rights of all by appropriate laws" and upholding the Fugitive Slave Act of 1850). Under *Prigg*, Congress had the same broad discretion to choose "appropriate" means for enforcing rights as it did when it acted to "carry into execution" its Article I powers, even where the Constitution provided no explicit textual authority for an enforcement power.

Those who drafted and supported the Fourteenth Amendment, though they abhorred the "right" the Court upheld in *Prigg*, made sure to incorporate the *Prigg* Court's understanding of congressional power, and enlisted it in the support of the causes of liberty and equality. Reconstruction legislators first acted on this understanding of Congress's enforcement power when they approved the Thirteenth Amendment. The first section, of course, decreed the abolition of

slavery, while the second added, in language borrowed from *Prigg* (as well as *McCulloch*), that "Congress shall have the power to enforce this article by appropriate legislation." U.S. Const. amend. XIII, § 2.

At the same time legislators discussed the power to enforce the Fourteenth Amendment, they displayed their understanding of the power to enforce a constitutional provision "by appropriate legislation" when enacting the Civil Rights Act of 1866. *See* Br. for the Federal Appellee, at 17-18. The Act, which applied to northern and southern States alike, recognized as citizens all persons born in the United States, and prohibited both state officials and private persons from depriving anyone, on the basis of race, of the rights to make and enforce contracts, sue in court, give evidence, and own real and personal property. These protections extended far beyond the self-executing provisions of the Thirteenth Amendment; in today's terms, they were "prophylactic" enforcement measures. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968) ("[T]he majority leaders in Congress—who were, after all, the authors of the Thirteenth Amendment—had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act."); Amar, *Intratextualism*, 112 Harv. L. Rev. at 823 (the 1866 Act, which "swept far beyond merely prohibiting slavery and involuntary servitude," illustrates the 39th Congress's "broad view" of the enforcement power).

The legislators, who would shortly approve the Fourteenth Amendment's near-identical enforcement clause, pointed to *McCulloch* and *Prigg*'s expansive

construction of congressional power as the proper framework for assessing whether the 1866 Act qualified as "appropriate legislation." Republicans drew on "the celebrated case of *McCulloch vs. the State of Maryland*" to explain why Congress had power to enact the 1866 Act. Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. Wilson).[6] Under *McCulloch*, Representative Wilson noted, Congress was the "sole judge" of the necessity of a measure that was indisputably directed at a legitimate end. *Id.* Wilson's speech pointedly explained that *Prigg*'s broad understanding of the congressional enforcement power, previously a weapon against liberty, could now be applied in freedom's service: "We will turn the artillery of slavery upon itself." *Id.* Representative Wilson further elaborated, "And now, sir, we are not without light as to the power of Congress in relation to the protection of these rights. In the case of *Prigg vs. Commonwealth of Pennsylvania*—and this it will be remembered was uttered in behalf of slavery—I find this doctrine, and it is perfectly applicable to this case." Cong. Globe, 39th Cong., 1st Sess. 1294 (1866).

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[6] One reason the Fourteenth Amendment was adopted was to put beyond doubt the constitutionality of the Civil Rights Act of 1866. Though Representative Bingham doubted whether the Thirteenth Amendment provided a sufficient basis for the 1866 Act, Representative Eliot's view is typical of Republican opinion—that the Fourteenth Amendment was not necessary to support the Act. "I voted for the civil rights bill, and I did so under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question." Cong. Globe, 39th Cong., 1st Sess. 2513 (1866) (statement of Rep. Eliot).

Representative Wilson punctuated his point by reading from Justice Story's opinion in *Prigg*, which, in turn, invoked Chief Justice Marshall's opinion in *McCulloch*. *Id.*

The debate proceeded along these lines, continually re-emphasizing the need for broad congressional powers. Representative Shellabarger stated that the relevant question was whether the Act's provisions fell within "the rule laid down by the Supreme Court in innumerable cases, that in order to entitle this Government to assume a power as an implied power of this Government it 'must appear that it is appropriate and plainly adapted to the end.'" Cong. Globe, 39th Cong., 1st Sess. 1294 (1866) (quoting Story, *supra* note 5, at 416). Senator Trumbull similarly viewed the enforcement clause as a grant of power "to secure freedom to all people in the United States," stating that the clause "vests Congress with the discretion of selecting that 'appropriate' legislation, which it is believed will best accomplish the end." *Id.* at 475; *see also id.* at 43 (1865) (Section 2 of the Thirteenth Amendment "was inserted expressly for the purpose of conferring upon Congress authority by appropriate legislation to carry the first section into effect. . . . What that 'appropriate legislation' is, is for Congress to determine, and nobody else."); *id.* at 1124 (1866) (statement of Rep. Cook) ("Congress should be the judge of what is necessary" for securing the rights of freemen to former slaves).

This understanding of the text's contemporary meaning sheds additional light on the intentions of the Fourteenth Amendment's congressional proponents. Given the widely shared meaning of the

words the Framers chose, it is clear that they intended to confer broad discretionary powers—including the power to enact prophylactic measures. As Senator Howard emphasized, Section 5 is "a direct affirmative delegation of power to Congress to carry out all the principles" of Section 1; the Amendment gives the national legislature "authority to pass laws which are appropriate to the attainment of the great object of the amendment"; and "Congress [has] the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith." Cong. Globe, 39th Cong., 1st Sess. 2766, 2768 (1866) (statements of Sen. Howard).

C. The Drafting History of the Fourteenth Amendment Confirms That the Enforcement Power Was Understood To Be Broad and Central to the Amendment's Goals

Before Congress considered the wording it ultimately adopted as the Fourteenth Amendment, the House debated an initial draft. Nothing in the drafting history of the Fourteenth Amendment implies a narrow construction of congressional power to enforce its guarantees.

To the contrary, congressional power was so central to the Fourteenth Amendment's drafting history that the Joint Committee on Reconstruction's initial draft was solely a grant of congressional authority. On February 26, 1866, Bingham proposed this text:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and

> immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). Introducing the initial draft, Bingham stressed the importance of giving Congress the power to act to protect constitutional rights against state infringement, in similar terms to those he used later to defend the new proposal: "Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution." *Id.* For Bingham, congressional enforcement power was so significant that an earlier grant of authority might have averted the national catastrophe of the Civil War: "Nothing can be plainer to thoughtful men than that if the grant of power had been originally conferred upon the Congress of the nation, and legislation had been upon your statute-books to enforce these requirements of the Constitution in every State, that rebellion, which has scarred and blasted the land, would have been an impossibility." *Id.*

By granting Congress the power to make all laws "necessary and proper" to secure constitutional rights, the initial draft was similar to the final version of Section 5 in that it would have incorporated a broad construction of powers under *McCulloch*. The wide discretion these words would have given to Congress did not go unnoticed. *See* Cong. Globe, 39th Cong., 1st Sess. 1065 (statement of Rep. Hale) ("It has been settled judicially . . . that the words 'necessary and proper,' which are found in this amendment, as well

as in the original Constitution, by no means imply indispensable necessity . . . [I]t has been expressly settled that it means simply 'needful,' 'requisite,' conducive to.").

The initial draft met with skepticism from both sides of the House on other grounds. Democrats, and some Republicans, expressed concern with the initial draft's language, not because it used the phrase "necessary and proper," but because it would have granted authority to "secure . . . to all persons in the several States equal protection in the rights of life, liberty, and property." On one reading of this text, the draft would have granted sweeping power to pass equal legislation upon *all* matters regarding life, liberty, and property in the States. *See* Cong. Globe, 39th Cong., 1st Sess. 1064 (1866) (statement of Rep. Hale) ("[I]t is a grant of power in general terms—a grant of the power to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation."); *see also id.* at 1082 (statement of Sen. Stewart) ("The only way this could be accomplished, would be for Congress to legislate fully upon all subjects affecting life, liberty, or property, and in this way secure uniformity and equal protection to all persons in the several states.").

Attempting to respond to this criticism, Representative Bingham rejected that interpretation of the initial draft, stating that it was "simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today." Cong. Globe, 39th Cong., 1st Sess. 1088 (1866). Despite this explanation,

the initial draft's ambiguous wording appears to have contributed to its postponement and the final version of the Amendment attempted to eliminate the ambiguity that gave rise to these concerns.

Another reason that the initial draft was postponed, and eventually superseded, was that it *did not go far enough* to secure liberty and equality. The difficulty with a constitutional amendment limited to granting legislative power was that any enforcement legislation could be repealed by a bare majority in Congress. Representative Hotchkiss expressed this concern, provoking laughter by stating that Bingham was "not sufficiently radical in his views upon this subject." Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). "It should be a constitutional right that cannot be wrested from any class of citizens, or from citizens of any State by mere legislation. But this amendment proposes to leave it to the caprice of Congress; and your legislation upon the subject would depend on the political majority of Congress, and not upon two thirds of Congress and three fourths of States." *Id.*

Representative Hotchkiss agreed that Congress should have an enforcement power, and stated that he would vote with Bingham to enact laws enforcing constitutional rights. Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). But the absence of self-executing protections against state infringement led Hotchkiss to suggest postponing consideration of the initial draft, so that a new draft could be formulated, securing constitutional rights against a future congressional majority that might be hostile to racial equality. *Id.* In view of these various objections, the House voted 110-37 to postpone consideration of the

initial draft. *Id.* Many of the Fourteenth Amendment's key supporters, including Representatives Bingham and Stevens, voted in favor of postponement. *Id.*

As ultimately adopted, the Fourteenth Amendment responded to the objections voiced by members of the House against the initial draft.[7] By spelling out separately the Due Process Clause and the Equal Protection Clauses, the new proposal avoided the interpretation that the Amendment would give Congress overly broad power to pass uniform legislation on all matters affecting life, liberty, and property within the States.[8] More fundamentally, Section 1 of the Amendment provided self-executing protections for constitutional rights, meeting the concern that a future Congress could repeal any legislation Congress passed under an enforcement-only amendment. *See, e.g.*, Cong. Globe,

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[7] The final version of the Amendment, of course, did more than respond to these objections, adding three entirely separate sections. *See* U.S. Const. amend. XIV, §§ 2-4. Section 2 established new rules for apportioning Representatives to the States; Section 3 prevented the election or appointment to any federal or State office of any person who had held any of certain offices and then engaged in insurrection, rebellion or treason; and Section 4 confirmed that neither the United States nor any State would pay damages for the loss of slaves or debts that had been incurred by the Confederacy.

[8] By spelling out due process and equal protection rights, Bingham attempted to specify the subjects over which Congress had enforcement power. These protections are, of course, nonetheless "phrased at a high level of generality, encompassing or incorporating a broad array of constitutional rights." Br. for the Federal Appellee at 22.

39th Cong., 1st Sess. 2462 (1866) (statement of Rep. Garfield) (constitutionally guaranteed protections of civil liberties should be adopted to ensure that a future majority in Congress could not repeal the provisions of the Civil Rights Act).

Though it provided an extra layer of protection for constitutional rights that the initial draft lacked, the final version of the Fourteenth Amendment did not in any way detract from the importance of Congress's power to enforce the right to equal protection of the laws and other constitutional rights. The new proposal provided explicitly that Congress would have power to enforce the substantive provisions of the Amendment, using language that, as discussed above, was widely understood to incorporate a broad view of congressional power and a deferential approach to judicial scrutiny of congressional exercises of that power. *See* U.S. Const. amend. XIV, § 5. Those who spoke in favor of the new version of the Amendment continued to stress both the breadth of Section 5's enforcement power and its central importance to the Amendment. Indeed, the new version was modeled on the nearly-identical clause of the Thirteenth Amendment, which was understood by its Framers to give Congress power to secure freedom to the former slaves.

Review of the drafting history thus clarifies that the change from the initial draft's wording from "necessary and proper to secure" constitutional rights to "appropriate legislation" to "enforce" rights did not change Congress's power to remedy or deter constitutional violations—the "great want" in the Constitution that Bingham sought to remedy. *See* McConnell, *Institutions and Interpretation*, 111 Harv.

L. Rev. at 177-81. The Fourteenth Amendment gave Congress the authority to enact "appropriate" laws, a word that was synonymous with—and certainly no narrower than—the term "necessary and proper." *See* Caminker, *"Appropriate" Means-Ends Constraints*, 53 Stan. L. Rev. at 1161. As authoritatively interpreted by the *McCulloch* Court, the term "necessary and proper" was interchangeable with the term "appropriate." *See* 17 U.S. at 413-21. The debates on both drafts reflect this understanding. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 586 (1866) (statement of Rep. Donnelly) (using the phrase "appropriate legislation" when discussing the initial draft); *id.* at 2766 (statement of Sen. Howard) (using the phrase "necessary and proper" when discussing the new proposal).

Similarly, the terms "secure" (used in the initial draft) and "enforce" (used in the Thirteenth Amendment and in the Fourteenth Amendment's final form) were considered equivalent during the debates. Bingham stated that the initial draft granted Congress "the power to enforce the bill of rights," Cong. Globe, 39th Cong., 1st Sess. 1088 (1866); the final version was said by one Representative to provide for "securing an equality of rights to all citizens." *Id.* at 2502 (statement of Rep. Raymond).

The new text of Section 5 thus paralleled the Thirteenth Amendment's enforcement clause. As explained above, the Thirteenth Amendment's enforcement clause was plainly understood to invoke *McCulloch*'s understanding of broad congressional power to choose "appropriate" means. As this Court has explained, "[t]he substitution of the 'appropriate

legislation' formula was never thought to have the effect of diminishing the scope of this congressional power." *Katzenbach v. Morgan*, 384 U.S. 641, 650 n.9 (1966) (citing Cong. Globe, 42nd Cong., 1st Sess. App. 83 (1871)).

D. The Fourteenth Amendment's Ratification Debates Confirm That Congress Would Have Broad Power to Enforce the Fourteenth Amendment

The ratification debates provide further evidence of the contemporary understanding of Congress's broad power to enforce the Fourteenth Amendment's substantive guarantees. In the North, the enforcement clause was little discussed. In the South, however, the legislative power that Section 5 gave Congress became a focal point for opposition to ratification; Democrats objected strenuously to the broad power they understood that Congress would have if the Amendment were ratified.

In state after state, Southern opponents of the Fourteenth Amendment expressed the fear that the authority to pass "appropriate legislation" would give Congress what they considered to be an excessive degree of power to define the obligations of States with respect to their citizens. *See* James E. Bond, *No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment* 254-55 (1997). One Texas Senator summed up these concerns: "What is 'appropriate legislation?' The Constitution is silent; therefore, it is left for the Congress to determine." *Journal of the Senate of the State of Texas*, 11th Legis., 421-22 (1866). In the same vein, Governor Jenkins of Georgia worried that Congress would have too much power over the States:

"It will be contended that [members of Congress] are the proper judges of what constitutes appropriate legislation. If therefore, the amendment be adopted, and a fractional Congress . . . be empowered 'to enforce it by appropriate legislation,' what vestige of hope remains to the people of those States?" Bond, *supra*, at 238. In many southern States, the ratification debates included similar statements recognizing that the Amendment confers broad prophylactic power on Congress. *See id.* at 34 (Mississippi); *id.* at 56-57 (North Carolina); *id.* at 87 (Louisiana); *id.* at 104 (Alabama); *id.* at 126-27 (South Carolina); *id.* at 148-51 (Virginia); *id.* at 173-74 (Florida); *id.* at 192-93 (Arkansas).

E. Legislative Interpretations of Section 5 in the Reconstruction Era Confirm the Contemporary Understanding of Congress's Enforcement Power

After the Fourteenth Amendment was ratified, legislative statements from the Reconstruction era reinforced the Framers' understanding of the text of Section 5: that Congress had been given wide latitude to select appropriate measures to achieve the purpose of protecting constitutional rights. Legislators repeatedly emphasized this understanding of Congress's broad power to enforce the guarantees of the Fourteenth Amendment. "When I assert that Congress has an ample power over this question," emphasized Senator Sumner,

> I rely upon a well known text . . . *McCulloch vs. State of Maryland* . . . . [T]he Supreme Court will not undertake to sit in judgment on the means employed by Congress in carrying out a power which exists in the Constitution. . . . Here is the

> definition of citizenship and the right to equal protection of the laws, . . . both placed under the safeguard of the nation. Whatever will fortify these is within the power of Congress, by express grant.

Cong. Globe, 42nd Cong., 2nd Sess. 728 (1872). *See also* Cong. Rec., 43rd Cong., 1st Sess. 414 (1874) (statement of Rep. Lawrence) ("The power to secure equal civil rights by 'appropriate legislation' is an express power; and Congress, therefore, is the exclusive judge of the proper means to employ. This has been settled in *McCulloch vs. Maryland*."); Cong. Globe, 41st Cong., 2nd Sess. 3882 (1870) (statement of Rep. Davis) ("No broader language could be adopted than this with which to clothe Congress with power . . . . Congress is clothed with so much power as is necessary and proper to enforce the two amendments to the Constitution, and is to judge from the exigencies of the case what is necessary and what is proper."); Cong. Globe, 42nd Cong., 1st Sess. App. 83 (1871) (statement of Rep. Bingham) ("The power to enforce . . . is as full as any grant of power to Congress.").

* * * * * * *

The Fourteenth Amendment conferred broad power and discretion on Congress to protect the Amendment's majestic guarantees through laws molded by legislative experience and judgment. The Fourteenth Amendment's text, purpose, and history inform the meaning of the Fifteenth Amendment's enforcement clause as well, and powerfully reinforce the conclusion that Congress acted comfortably within its power to select "appropriate" means to enforce the Fourteenth and Fifteenth Amendments

when it reauthorized Section 5 of the Voting Rights Act.

In the legislation at issue, Congress acted to protect against racial discrimination in voting—clearly a core purpose under the Fourteenth and Fifteenth Amendments. Acting within its wide discretion to select appropriate means, Congress permissibly determined that prophylactic measures were appropriate to protect against unconstitutional racial discrimination in the administration of voting. Pursuant to the original understanding of the Reconstruction enforcement provisions—that Congress would have broad power to determine what is appropriate to protect the rights to equality, freedom, and political participation enshrined in the Reconstruction Amendments—the Court should defer to the legislature's reasoned judgment.

CONCLUSION

The judgment of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted.

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March 25, 2009

AMICUS CURIAE BRIEF

No. 08-322

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC HOLDER, Attorney General of the United States, et al.

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF REPS. JOHN CONYERS, JR., F. JAMES SENSENBRENNER, JR., JERROLD NADLER, AND MELVIN L. WATT, AND FORMER REP. STEVE CHABOT AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE[1]

Amici curiae are the current and former bipartisan leadership of the House Committee on the Judiciary and its Subcommittee on the Constitution, Civil Rights, and Civil Liberties. They include: Rep. John Conyers, Jr. (D-MI), Chairman of the House Committee on the Judiciary and Ranking Member of the Judiciary Committee at the time of the 2006 reauthorization of the Voting Rights Act (VRA); Rep. F. James Sensenbrenner, Jr. (R-WI), Ranking Member of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, and Chairman of the Judiciary Committee at the time of the 2006 reauthorization; Rep. Jerrold Nadler (D-NY), Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, and Ranking Member of that Subcommittee at the time of the 2006 VRA reauthorization; Rep. Melvin Watt (D-NC), Member of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties and Chairman of the Congressional Black Caucus at the time of the 2006 reauthorization; and former Rep. Steve Chabot (R-OH), Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties at the time of the 2006 reauthorization.

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. No counsel, party, or person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters reflecting the consent of the parties have been filed with the Clerk.

Amici played a major role in the passage of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, and are deeply interested in its continued vitality.

Amici represent a combined experience of over 115 years in Congress. All *amici* were directly and substantively involved in the hearings and the Committee processes that led to the 2006 reauthorization. In renewing and extending the VRA, *amici* sought to "ensure that all aspects of the right to vote are protected, including the right to cast a meaningful ballot." H.R. REP. NO. 109-478, at 6 (2006) (Committee Statement on the Right to Vote and the Voting Rights Act of 1965).

Amici have an institutional interest in defending Congress's powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment to enact appropriate legislation protecting the right to vote. After conducting extensive hearings and based on a voluminous record, *amici* concluded that a reauthorization of Section 5 of the VRA is necessary to fulfill their constitutional responsibilities and to ensure that minority citizens have the "ability to fully participate in the electoral process." *Id.*

SUMMARY OF ARGUMENT

The Voting Rights Act of 1965 (VRA) represents the first successful response to nearly a century of minority disenfranchisement. Congress enacted the VRA in direct response to evidence of pervasive

efforts by southern states to deny blacks the right to vote. It has been the single most effective tool in combating discrimination in voting.

The 2006 reauthorization of Section 5 of the VRA continues the work of guaranteeing minority citizens the right to participate fully in the electoral process. The 2006 reauthorization is a model exercise of Congress's unique ability to legislate at the intersection of race, voting, and the political process. The overwhelming, bipartisan decision to reauthorize the VRA, which drew support from covered and non-covered jurisdictions alike, should be upheld by this Court under any standard.

This Court has long recognized that the political branches of the federal government play an integral role in protecting voting rights. The VRA represents Congress's most deliberative and sustained effort in this area. The Act has repeatedly been reexamined and revised by Congress, and on each occasion both the House and Senate have compiled extensive records that far surpass the standard set by this Court for justifying remedial and prophylactic legislation under Congress's enforcement powers. On each occasion, Congress has renewed the Act with broad bipartisan support.

The record before Congress demonstrates the VRA's unique success in rolling back a century of disenfranchisement. However, the record also demonstrates the continued need for Section 5 to block covered jurisdictions' implementation of new discriminatory voting rules. Moreover, Congress has responded to this evidence by tailoring the Act to respect states' independence. Congress has

consistently revisited the Act's provisions to ensure that the VRA imposes no unnecessary burdens on covered jurisdictions and will not outlive its usefulness.

The sufficiency of the record is reinforced by the subject matter covered by the VRA. This Court has recognized that Congress acts at the height of its powers when it legislates to regulate the political process, to prevent or remedy racial discrimination, or to protect fundamental rights, such as the right to vote. When Congress exercises its powers at the intersection of these three concerns – as it did here – this Court should defer to Congress's considered judgment.

ARGUMENT

I. The Voting Rights Act Responds To Nearly A Century Of Judicial And Congressional Inability To Protect Minority Suffrage.

The Fourteenth and Fifteenth Amendments confer broad powers on Congress to effectuate the rights they provide. Both during Reconstruction and in passing the VRA, Congress enforced those Amendments by enacting legislation to combat the disenfranchisement and political exclusion of minority citizens.

As history shows, this is not the first time this Court has faced claims, like those appellant tries to advance, that times have changed, making federal legislation protecting minority voting rights unnecessary. *See* Br. of Appellant 1-2 [hereinafter MUD Br.]. The success of the Reconstruction era legislation also led to arguments that federal

protection was no longer necessary. This Court agreed, setting off a century-long campaign by southern states to disenfranchise minorities and nullify this Court's and Congress's efforts to remedy that discrimination. The VRA, as extended and amended, has provided the only subsequent effective response to voting discrimination. Nonetheless, contrary to appellant's contention, the work of Section 5 is not yet complete.

1. During Reconstruction, Congress successfully deployed its Fourteenth and Fifteenth Amendment powers to protect minority suffrage. Those Amendments empower Congress to pass legislation to "effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966); *see also infra* Section III (discussing in more detail the scope of congressional enforcement powers). Congress used this authority in 1870 to pass the Enforcement Act, making "it a crime for public officers and private persons to obstruct exercise of the right to vote." *Katzenbach*, 383 U.S. at 310. A year later, Congress expanded the Act to provide for federal supervision of elections. *Id.*

Congress's aggressive enforcement of voting rights produced widespread black suffrage. During the early years of Reconstruction, "about two-thirds of eligible black males cast ballots in presidential and gubernatorial contests." Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING 7, 10 (Bernard Grofman & Chandler Davidson eds., 1992). Moreover, racially motivated violence during

elections declined dramatically. ALEXANDER KEYSSAR, THE RIGHT TO VOTE 106 (2000).

2. Believing exactly what appellant now claims – that the "emergency [of Reconstruction] no longer exist[ed] and there [was] no indication it [would] recur," MUD Br. 27 – this Court responded over-optimistically to minority citizens' progress. Persuaded that black citizens "ha[d] shaken off the inseparable concomitants" of slavery, *The Civil Rights Cases*, 109 U.S. 3, 25 (1883), this Court narrowly interpreted the Enforcement Act to reach only a small subset of the conduct that interfered with minority suffrage. *See, e.g., United States v. Cruikshank*, 92 U.S. 542, 559 (1875); *United States v. Reese*, 92 U.S. 214 (1875); *United States v. Avery*, 80 U.S. 251 (1871). *See generally* CHARLES LANE, THE DAY FREEDOM DIED (2008).

In the wake of these decisions, southern states embarked on a campaign to "nullifi[y]" the First Reconstruction. 51 CONG. REC. 6555 (1890) (Statement of Rep. Jonathan Rowell).[2] States reorganized voting precincts and closed polling places to obstruct black voters. KEYSSAR, *supra*, at 105. State legislatures also imposed residency requirements, poll taxes, and literacy tests, created complex voter registration systems, and strengthened criminal laws, all with the aim of disenfranchising black voters. *Katzenbach*, 383 U.S. at 310-11; KEYSSAR, *supra*, at 111-12.

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[2] Quoted in J. MORGAN KOUSSER, COLORBLIND INJUSTICE 24 (1999).

As a result, black political participation plummeted. In Mississippi, after 1890, less than 9,000 of the state's 147,000 voting-age black citizens remained registered to vote. KEYSSAR, *supra*, at 114. In Louisiana, where blacks had once constituted as much as 44 percent of the electorate, by 1920 they cast less than 1 percent of the votes. Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 2 (1965). In Georgia, as late as 1940, less than 5 percent of eligible back citizens were registered voters. J. MORGAN KOUSSER, COLORBIND INJUSTICE 201 fig. 4.1 (1999).

3. Although this Court attempted to defend the right to vote, it was unable to combat "the variety and persistence" of laws disenfranchising minority citizens. *Katzenbach*, 383 U.S. at 311. For instance, although this Court first struck down Texas's white primary in 1927 in *Nixon v. Herndon*, 273 U.S. 536, blacks remained excluded from the primary process until this Court's decisions decades later in *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953). Similarly, in *Guinn v. United States*, 238 U.S. 347 (1915), this Court struck down Oklahoma's grandfather clause, only to see the state respond with a similar attempt to circumvent the Fifteenth Amendment, which remained in place until *Lane v. Wilson*, 307 U.S. 268 (1939).

Because the right to vote is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), for much of the twentieth century, this Court also repeatedly confronted racially discriminatory laws passed by legislatures that were able to ignore minority interests. *See United States v. Carolene*

Prods. Co., 304 U.S. 144, 152 n.4 (1938). In particular, this Court's inability to protect minority suffrage resulted in a "strengthening of the segregation code[s]." C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 115 (3d ed. 1974). To give one striking example, Chief Justice Warren later suggested that *Brown v. Board of Education* "would have been unnecessary" if the South had been fairly apportioned before 1954. JOHN HART ELY, ON CONSTITUTIONAL GROUND 4 (1996).

4. Recognizing its limited ability to protect minority voting rights, this Court directed plaintiffs to seek relief from Congress. In *Giles v. Harris*, 189 U.S. 475, 482 (1903), for example, this Court instructed a black citizen asking to have his name added to Alabama's voting rolls to seek protection not from the courts but from the "legislative and political department of the government of the United States." *Id.* at 488. Years later, when faced with a malapportionment claim, this Court similarly directed the plaintiffs to "invoke the ample power of Congress." *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion).

5. Congress's initial responses proved no more effective than the courts', as they too provided only *ex post* remedies for disenfranchisement. The 1957 and 1960 Civil Rights Acts empowered the Department of Justice to bring suit on behalf of individuals illegally prevented from registering to vote. Christopher, *supra*, at 4, 5. However, when voters won redress, southern states "merely switched to discriminatory devices not covered by the federal decrees." *Katzenbach*, 383 U.S. at 314.

Moreover, "case-by-case adjudication," even with the United States prosecuting the cases, "proved too ponderous a method to remedy voting discrimination." *City of Rome* v. *United States*, 446 U.S. 156, 174 (1980); *see* H.R. REP. NO. 97-227, at 3-4 (1981) (same); S. REP. NO. 97-417, at 5 (1982) (same). Between 1957 and 1963, these suits secured registration for only 6,000 black citizens. Christopher, *supra*, at 6.

6. The VRA successfully responded to these problems: Section 5 crafted effective prophylactic administrative and judicial relief. BRIAN K. LANDSBERG, FREE AT LAST TO VOTE 170, 180-82 (2007). The Act's preclearance requirement froze existing voting laws in the covered jurisdictions, ensuring that states could not perpetuate disenfranchisement through new techniques. It placed responsibility for identifying changes on jurisdictions and for overseeing the protection of voting rights within the executive branch of the federal government, rather than placing the burden of challenging unfair practices entirely on disenfranchised and disadvantaged citizens.

The VRA's shift from *ex post* to prophylactic remedies resuscitated effective enforcement of the Fourteenth and Fifteenth Amendments. "The Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina and South Carolina as in the entire century before 1965." Davidson, *supra*, at 21.

Moreover, during the 1982 and 2006 reauthorization processes, Congress concluded that Section 5 of the VRA continued to play a critical role in preventing minority disenfranchisement. Contrary to appellant's assertion that there was no evidence that covered jurisdictions continue to engage in "gamesmanship," MUD Br. 13, 43, Congress concluded that Section 5 has helped to deter, detect, and prohibit a wide range of voting laws and procedures in covered jurisdictions that would otherwise have deprived minorities of their voting power. *See infra* pp. 14-23 (discussing Congress's conclusions from the 2006 reauthorization hearings and debates).

However, as this Court has just reaffirmed, "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes." *Bartlett v. Strickland*, 556 U.S. ___ (2009) (slip op. at 21). Section 5 continues to play a major role in combating discrimination. The VRA's work, particularly that of its prophylactic remedies, is not yet complete.

II. The Legislative History Of The 2006 Reauthorization Shows That Congress Both Considered And Responded To Extensive Evidence In Deciding To Renew Section 5.

Perhaps no statute in American history has been the subject of more extensive, careful, and sustained consideration by Congress than the VRA. *See* 152 CONG. REC. H5143 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner) (describing the House Judiciary Committee record as "one of the most extensive considerations of any piece of

legislation that the United States Congress has dealt with in the 27½ years that I have been honored to serve as a Member of this body"); J.S. App. 112 (noting that "Congress approached its task seriously and with great care[,....] held extensive hearings and compiled a massive legislative record documenting contemporary racial discrimination in covered states").

This Court has recognized that Congress possesses special expertise in gathering and analyzing the large amounts of information essential to making well-informed policy determinations. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) ("When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue."); *see also, e.g., Turner Broad. Sys. v. FCC*, 512 U.S. 622, 665-66 (1994) (same); Allen Schick, *Informed Legislation: Policy Research Versus Ordinary Knowledge*, *in* KNOWLEDGE, POWER & THE CONGRESS 99 (William H. Robinson & Clay H. Wellborn eds., 1991). This expertise stems from Congress's ability to go beyond the facts in individual lawsuits. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 502-03 (1980) (Powell, J., concurring) (noting that Congress's "special attribute as a legislative body lies in its broader mission to investigate and consider *all* facts and opinions that may be relevant to the resolution of an issue" (emphasis added)).

Moreover, particularly when it comes to questions involving the political process, legislation

can be informed in valuable ways by Members' own extensive experiences. Members gain knowledge not only though their direct experiences in running for office, but also through wide-ranging contacts with constituents and executive branch representatives. *See Schick*, *supra*, at 104-05. Finally, geographic diversity among its Members ensures that Congress is able to consider regional differences and state interests when crafting legislation. Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1179 (2001).

All these abilities are evident in Congress's consideration of whether to reauthorize Section 5. Contrary to appellant's suggestions, *see, e.g.*, MUD Br. 42-43, the voluminous record compiled by Congress during the 2006 reauthorization fully supports Congress's decision to retain Section 5. In addition, the reauthorization process reflects a widespread, bipartisan consensus, supported by affected jurisdictions. For instance, House Judiciary Committee members from covered jurisdictions were active participants in shaping and supporting the 2006 reauthorization. This Court should therefore affirm the district court's judgment that Congress had a firm basis for reauthorizing Section 5 for an additional 25 years.

A. Congress Paid Careful Attention To This Court's Decisions Throughout The Renewal Process.

Prior to the 2006 reauthorization, House leadership and staff reviewed this Court's recent decisions regarding the appropriate scope of

congressional enforcement powers under the Fourteenth Amendment. *See* H.R. REP. NO. 109-478, at 54-56 (2006). Congress was well aware of the standards articulated by this Court's decisions in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny. It understood the need both to develop a complete record before acting and to tailor its response to that record to ensure that its legislation was "congruent and proportional." Testimony from numerous witnesses about this Court's guidance helped inform the House Judiciary Committee in assembling a strong legislative record during the VRA reauthorization.

Congress concluded that the record supporting reauthorization "far exceeds" the records this Court found sufficient in both *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), and *Tennessee v. Lane*, 541 U.S. 509 (2004).[3] H.R. REP. NO. 109-478, at 57. In fact, the 2006 record includes exactly the kind of specific evidence of intentional discrimination that the dissenters found missing in those cases. *Hibbs*, 538 U.S. at 745-49; *Lane*, 541 U.S. at 541-44. Moreover, the 2006 record is comparable in both its thoroughness and the quality

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[3] The 2006 record was also far more extensive than the record this Court recently found sufficient to support the State of Indiana's decision to adopt a voter identification requirement in *Crawford v. Marion County Bd. of Elections*, 128 S. Ct. 1610 (2008). There, this Court found the state's interest in enhancing the integrity of the electoral process adequate to uphold the identification requirement where "[t]he record contain[ed] *no* evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* at 1618-19 (emphasis added).

of supporting evidence to the legislative records this Court found adequate to support earlier versions of the VRA. *See City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *see, e.g.*, J.S. App. 112-13, 124 (making this comparison).

B. The 2006 Reauthorization Rests On An Extensive Record That Shows Both The Continuing Need For Section 5 And Its Effectiveness.

The 2006 reauthorization process occurred against the backdrop of Congress's experience over the past 40 years in crafting and reconsidering the VRA. Each time Congress considered the need for Section 5 – in 1965, 1970, 1975, 1982, and 2006 – it first developed and carefully studied a massive record before deciding how best to refine the Act.

This Court has repeatedly recognized the quality of that legislative process. In *Katzenbach*, this Court emphasized the "voluminous legislative history" underlying the VRA as a basis for upholding the Act. 383 U.S. at 308. Similarly, in *City of Boerne*, this Court recognized that the record of "widespread and persisting" racial discrimination compiled by Congress during the reauthorizations provided detailed evidence of the continued need for the VRA. 521 U.S. at 526. It pointed to the VRA as a model for Congress's exercise of its enforcement powers. *See id.* at 530. Congress's conclusion in 2006 that the VRA remains necessary rests on an equally careful process.

1. During the initial authorization in 1965, Congress had before it a record of more than 95 years

of widespread racial discrimination in the electoral process. H.R. REP. NO. 109-478, at 6-7; H.R. REP. NO. 89-439, at 7 (1965). Congress conducted 9 days of hearings, with a total of 67 witnesses, and held 3 days of floor debate in the House and 26 in the Senate. *Hearings on H.R. 6400 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. (1965); *Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. (1965). Testimony from Members of Congress, the Attorney General, members of the U.S. Commission on Civil Rights, state and local officials, private citizens, and representatives from voting rights organizations led Congress to conclude that "widespread violations of the 15th Amendment" provided "ample justification for congressional action." H.R. REP. NO. 89-439, at 19. Ultimately, Congress approved the Act by wide margins in both Houses.

In 1975, in a thorough review of Section 5,[4] Congress compiled an equally persuasive record showing the persistence of many of the problems the VRA was intended to combat. During 13 days of hearings in the House and 7 in the Senate, Congress heard from a wide variety of witnesses, again including Members of Congress, the DOJ, state and

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[4] In 1970, Congress reviewed the progress that had been made under the VRA and extended Section 5's preclearance requirement for an additional 5 years. H.R. REP. NO. 91-397 (1969). Because covered jurisdictions had not truly begun to comply with Section 5's submission requirement until after this Court's decision in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), the 1970 record contained a relatively limited discussion of the need for, and effectiveness of, the preclearance process.

local officials, private citizens, and voting rights organizations. H.R. REP. NO. 94-196, at 3-4 (1975). On the basis of evidence in the nearly 3,000-page record documenting significant ongoing discrimination, Congress concluded that there were still "continuing and significant deficiencies" in minority political participation and thus voted to extend Section 5 for another 7 years. *Id.* at 7.

Congress's 1982 reauthorization process was equally comprehensive, again supporting its conclusion that Section 5 remained necessary and appropriate legislation. The House held 18 days of hearings, including regional hearings in covered jurisdictions, and heard testimony from 156 witnesses, assembling a record of over 2,800 pages. H.R. REP. NO. 97-227, at 2 (1981). Similarly, the Senate, during 9 days of hearings, heard from 51 witnesses and amassed a record of over 2,900 pages. S. REP. NO. 97-417, at 3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 180. The evidence of discrimination echoed Congress's findings in 1975 that covered jurisdictions had continued to devise means to suppress effective minority participation. *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 17 (1981). Congress responded by extending Section 5 for an additional 25 years.

2. The 2006 reauthorization process was also very rigorous. Congress again engaged in extensive factfinding and analysis before concluding that the VRA remains necessary today. *Voting Rights Act: Section 5—Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm.*

on the Judiciary, 109th Cong. 67 (2005). The House Judiciary Committee alone conducted 12 hearings and heard from 46 witnesses representing a breadth of interests ranging from federal and state executive officials to civil rights leaders. H.R. REP. NO. 109-478, at 11-12. The Committee's record totaled over 12,000 pages. 152 CONG. REC. H5136 (daily ed. July 13, 2006) (statement of Rep. Chabot). The Senate Judiciary Committee held 9 hearings and also heard from 46 witnesses, creating a combined record of over 15,000 pages. Contrary to appellant's claim that Congress made "no serious effort" in 2006 to reexamine Section 5's continued appropriateness, MUD Br. 2, the record provides detailed evidence of Congress's thorough reconsideration of the Act. This extensive record confirmed the clear need for reauthorization, and Congress approved the 25-year extension by wide margins of 390-33 in the House and 98-0 in the Senate. 152 CONG. REC. H5207 (daily ed. July 13, 2006); 152 CONG. REC. S8012 (daily ed. July 20, 2006).

The record confirms that although the VRA is one of the most successful civil rights statutes in American history, its "work is not yet complete." 152 CONG. REC. H5143-44 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner). The House Judiciary Committee requested, received, and incorporated into its record 11 reports documenting the continuation of discrimination after 1982 in covered jurisdictions. *See Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. On the Judiciary*, 109th Cong. (2006) [hereinafter *H.R. Hearing* 109-103]. Each report describes numerous

examples of discrimination that prompted Section 5 objections or litigation. One of the reports, for example, detailed nearly 300 cases of voting discrimination. THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT, THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION (2006), *in H.R. Hearing* 109-103, at 378 [hereinafter ACLU REPORT]. The vast evidence of ongoing discrimination in the record shows that covered jurisdictions continue to deny minority voters full and effective participation in the political process with a variety of techniques, including discriminatory annexations, de-annexations, and consolidations; redistricting plans; and polling relocations. H.R. REP. NO. 109-478; *H.R. Hearing* 109-103; *Voting Rights Act: Section 5 of the Act — History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *H.R. Hearing* 109-79]; *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *H.R. Hearing* 109-70].

Appellant stresses that the District Court referenced only three specific examples of discriminatory voting changes in covered jurisdictions as evidence that Congress's record does not justify the continued need for Section 5. MUD Br. 43. Contrary to appellant's assertion, the District Court describes in detail numerous examples of discrimination in covered jurisdictions. *See, e.g.*, J.S. App. 69-81, 96-106, 155-83; *id.* at 80 ("Scouring the legislative record ourselves, we have discovered many more section 5 objections based on discriminatory

intent."). Moreover, appellant blindly ignores the hundreds of accounts of continuing discrimination in covered jurisdictions contained in the *congressional* record. These numerous examples reveal both that covered jurisdictions continue to adopt discriminatory voting changes and attempt to evade enforcement of Section 5, and confirm that such attempts are more than just "isolated actions." MUD Br. 45.

The 2006 congressional record is replete with examples of discrimination. Limited space constrains *amici* to highlighting only a few representative examples of the persistent discrimination Congress confronted.

Polling Place Changes. In 1995, Jenkins County, Georgia, attempted to relocate a polling site from a location in a predominantly black community easily accessible by foot to one in a predominantly white neighborhood outside the city limits, and not easily accessible. ACLU REPORT at 33-34; Robert Kengle, VOTING RIGHTS IN GEORGIA, 1982-2006, A REPORT OF THE RENEWTHEVRA.ORG app. 1, xxviii, *in H.R. Hearing* 109-103, at 1499. The Attorney General objected to the change, noting that the county's proffered reasons for the location change were merely "pretextual" and were designed to "thwart recent black political participation." *Id.*

In 1994, in Sunset, Louisiana, at the request of white voters, the police jury agreed to move a polling place from the community center to a different building that had been a site of historical racial discrimination. Debo P. Adegbile, VOTING RIGHTS IN LOUISIANA 1982-2006, at 31, *in H.R. Hearing* 109-103, at 1592. The police jury held no hearings, sought no

input from the black community, and did not advertise the change in any way. *Id.* Minority leaders in the town did not learn of the proposed change until notified by the DOJ during the Section 5 preclearance process. *Id.* Likewise, Johnson County, Georgia, sought in 1992 to relocate a voting precinct from the county courthouse to the private American Legion Hall, which had a well-known reputation for racial hostility and exclusion. ACLU REPORT at 337; Kengle, *supra*, at app. 1, xxviii. In its objection letter, the DOJ concluded that the polling place change had the effect of "discouraging black voters from turning out to vote." ACLU REPORT at 337.

Similarly, in 2003 Waller County, Texas, tried to restrict early voting at a polling site near Prairie View A&M, a historically black college, after two black students decided to run for county office. NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, at 65-66 (2006), *in H.R. Hearing* 109-103, at 104 [hereinafter NAT'L COMM'N REP.]. Appellant dismissively contends that Waller County's discriminatory actions were simply "one-off occurrences" that do not justify the continued need for Section 5, MUD Br. 46. However, Prairie View A&M is a historically black college whose students comprise 20% of the county's voting population. Thus, the county's restriction on voting directly reduced the relative voting strength of black citizens.

Section 5 is designed to address not only this type of purposeful "gamesmanship," but also inadvertent or inattentive actions that have a discriminatory effect on minority voters. However, even if Section 5 were aimed only at ending intentional

"gamesmanship," Waller County's actions would still be problematic. The county's "gamesmanship" was not "highly debatable" as appellant contends, MUD Br. 46; it was undeniably discriminatory.

Discriminatory Annexations. In 1990, the city of Monroe, Louisiana, attempted to annex white suburban wards to its city court jurisdiction. Adegbile, *supra*, at 23. In its Section 5 objection letter, the DOJ noted that the wards in question had been eligible for annexation since 1970, but that there had been no interest in annexing them until the first African-American candidate ran for Monroe city court. *Id.* In 2003, the Department of Justice interposed an objection to a proposed annexation in North, South Carolina, because the town had been racially selective in its response to both formal and informal annexation requests. John C. Ruoff & Herbert E. Buhl III, VOTING RIGHTS IN SOUTH CAROLINA 1982-2006, at 26, *in H.R. Hearing* 109-103, at 1928. In rejecting the proposed annexation, the Attorney General concluded that "race appears to be an overriding factor in how the town responds to annexation requests." *Id.*

Discriminatory Reductions. In 1991, Concordia Parish, Louisiana, attempted to exclude minority voters by reducing the size of its police jury from 9 to 7 seats in order to eliminate one majority black district. Adegbile, *supra*, at 24. Although the parish claimed that the reduction was a cost-saving measure, the DOJ objected to the change, noting that the parish had been unconcerned about saving money until an influx of African-American residents converted the district from a majority-white district to a majority-black district. *Id.*

3. The 2006 record also reveals that between 1982 and 2004, the rate of DOJ objections remained almost constant when compared to the period between 1965 and the 1982 reauthorization, with more than 600 objections being interposed. *H.R. Hearing* 109-103, at 172. Congress recognized, and this Court found in *City of Rome*, 446 U.S. at 181, that the number and nature of objections interposed by the Attorney General indicate the continued need for preclearance. J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, at 12, *in H.R. Hearing* 109-103, at 2664. Congress also found that between 1982 and 2003, covered jurisdictions withdrew more than 200 proposed changes after initially seeking preclearance under Section 5. NAT'L COMM'N REP. at 58. Jurisdictions routinely abandon proposed discriminatory voting changes when a "Request for More Information" by the Attorney General signals that preclearance is unlikely. These withdrawal letters highlight hundreds of discriminatory voting changes that *would have been* implemented in the absence of Section 5. *Id.*

Finally, the record reveals that the risk of receiving an objection letter from the DOJ or failing to obtain a declaratory judgment from a federal district court also deters covered jurisdictions from even proposing discriminatory voting changes in the first place. *See H.R. Hearing* 109-79, at 4 (statement of Rep. Chabot) (noting the "thousands of proposed plans that never came to fruition because of section 5"); *H.R. Hearing* 109-70, at 17; *see also* Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to*

Scuttle Section 5 of the Voting Rights Act, 84 NEB. L. REV. 605, 613-14 (2005). The preclearance requirement encourages jurisdictions to make voting choices that benefit *all* voters and helps to ensure that officials more carefully evaluate and modify voting changes that might otherwise be retrogressive before they are submitted for preclearance.

Appellant claims that Section 5 would not prevent the adoption of discriminatory voting practices by covered jurisdictions since officials in those jurisdictions would not submit those changes for preclearance. MUD Br. 45. Appellant's argument has only one of two implications: (1) covered jurisdictions do not implement discriminatory voting changes in the first instance because they realize the changes will not be precleared, or (2) covered jurisdictions implement discriminatory voting changes, but do not submit those changes for preclearance. The former interpretation *confirms*, rather than discredits, the deterrent effect of Section 5; the latter indicates that covered jurisdictions continue to engage in the "gamesmanship" that Section 5 is designed to address. Both implications support Congress's decision to reauthorize the VRA.

C. Congress Has Carefully Tailored The VRA To Respect States' Interests During Each Reauthorization.

The VRA represents an appropriate congressional response to the problem of pervasive racial discrimination in the electoral process. The record shows that in creating an administrative preclearance process, modifying the "bailout" process, and creating a clear sunset provision, Congress has

taken seriously both its responsibility to enforce the Fourteenth and Fifteenth Amendments and the need to respect local autonomy.

1. Congress initially developed the administrative preclearance regime as a speedy and efficient alternative to requiring that covered jurisdictions seek declaratory judgments before implementing voting-related changes. H.R. REP. NO. 97-227; *see also Morris v. Gressette*, 432 U.S. 491, 502-05 (1977); Mark Posner, *The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. CONST. L. & PUB. POL'Y 79, 154-55 (2006).[5] By requiring the Attorney General to make administrative preclearance decisions within a sharply limited time frame,[6] Congress recognized covered jurisdictions' strong interest in implementing legitimate new voting provisions quickly. *See* Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 681-82 (2008); Posner, *supra*, at 91-92.

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[5] Contrary to the suggestion of some *amici* that Section 5 enables DOJ to block changes "without any judicial review," Br. of Amici Thernstrom et al. at 17-18, covered jurisdictions have always been entitled to seek judicial preclearance regardless of DOJ's decision.

[6] The Attorney General has 60 days to interpose an objection to a submitted voting change, 28 C.F.R. § 51.10(a)(2) (2008), with the possibility of one 60-day extension. *Id.* § 51.37. Absent a timely objection, the change is automatically precleared. *See* 42 U.S.C. § 1973c(a); 28 C.F.R. § 51.42.

In reauthorizing Section 5, Congress also concluded that, contrary to appellant's assertion, MUD Br. 53, Section 2 litigation alone provides an "inadequate remedy" for minority voters. H.R. REP. NO. 109-478, at 57. Congress found that "case-by-case enforcement alone is not enough to combat efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process." *Id.* Recognizing that Section 2 has helped achieve important progress for minority voters in covered jurisdictions, Congress concluded that Section 5 is necessary to prevent "backsliding from the gains previously won" under both Section 2 and Section 5. *Id.* at 53. Moreover, Congress recognized that placing the burden on affected individuals to challenge discriminatory voting changes would leave many of those changes unchallenged, in part because the high costs and time constraints of litigation might discourage individuals from bringing suit. *See H.R. Hearing* 109-70, at 42 (noting that the cost of private litigation under section 2 may "run in the millions of dollars").

In addition, by placing the VRA's enforcement powers in the politically accountable executive branch, Congress took appropriate account of covered jurisdictions' interests in avoiding suits by individual litigants. *Cf. Alden* v. *Maine*, 527 U.S. 706, 759-60 (1999) (explaining why, even if the Eleventh Amendment prevents Congress from subjecting states to suit by private parties, enforcement by the United States remains appropriate).

2. In 2006, Congress reassessed several provisions of the VRA to determine whether conditions within covered jurisdictions required

modifications. Having already modified the "precisely tailored" bailout provision, 42 U.S.C. § 1973b(a), in 1982, Congress concluded in 2006 that that provision was effectively crafted to create incentives for covered jurisdictions to eliminate discriminatory features of their electoral systems, *see* Laughlin McDonald, *Racial Fairness: Why Shouldn't It Apply to Section 5 of the Voting Rights Act?*, 21 STETSON L. REV. 847, 851 (1992). Moreover, the provision ensured that Section 5 remains focused on those areas where oversight is necessary to prevent and respond to voting rights abuses.

Congress also reevaluated the need for federal examiners in covered jurisdictions and updated the VRA to fit the needs of states and localities. In response to evidence that examiners had been used only sparingly in recent years, Congress concluded that "the nature of the Federal examiner has changed" and that the federal examiner provisions had outlived their usefulness. *See Voting Rights Act: Sections 6 & 8—The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 5 (2005) (statement of Rep. Scott). Accordingly, Congress repealed Sections 6, 7, and 9 of the VRA in their entirety. *See* Pub. L. No. 109-246 § 3(c), 120 Stat. 580 (2006); *see also* H.R. REP. NO. 109-478, at 91-92.

Finally, during each reauthorization, Congress has included a sunset provision for Section 5, 42 U.S.C. § 1973b(a)(8), rather than making it permanent. This decision ensures that Congress will periodically reevaluate the need for the VRA. *See* Ann Althouse, *Vanguard States, Laggard States:*

Federalism and Constitutional Rights, 152 U. PA. L. REV. 1745, 1817 (2004).

The 2006 legislative record shows that Congress carefully considered what would constitute an appropriate reauthorization period. Rep. Louie Gohmert (R-TX) proposed an amendment on the House floor, H. AMDT. 1184 (offered July 13, 2006), that would have limited reauthorization to 10 years. The amendment was defeated by a vote of 134-288. 152 CONG. REC. H5205 (daily ed. July 13, 2006). In opposing the amendment, Rep. Sensenbrenner emphasized the importance of capturing more than one redistricting cycle to provide Congress with sufficient evidence to reassess Section 5. *Id.* at H5187. Thus, Congress decided to include a 25-year sunset provision in the Act. 42 U.S.C. § 1973b(a)(8). Contrary to appellant's claim that the provision somehow allows Congress to "indefinitely continue exercising extraordinary powers," MUD Br. 61, the very purpose of a sunset provision is to confine Congress's power to a defined and limited time period. Both the record and this Court's guidance support the conclusion that eliminating the vestiges of historical racial discrimination may well take this amount of time. *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). Just as significantly, Congress expressly declared that it would reconsider Section 5 in 15 years to ensure that the provision was still both necessary and effective. 42 U.S.C. § 1973b(a)(7).

3. In addition to carefully fine-tuning Section 5, Congress also considered but rejected proposed

amendments to the VRA that would have altered Section 5's coverage formula and bailout procedures. Congress's consideration of each of these proposed amendments shows its thorough and deliberative examination of Section 5 during the 2006 reauthorization.

An amendment offered by Rep. Charles Norwood (R-GA), H. AMDT. 1183 (offered July 13, 2006), would have replaced Section 5's "very carefully" crafted coverage formula, *see* 152 CONG. REC. H5185 (daily ed. July 13, 2006) (statement of Rep. Conyers), with a rolling test for Section 5 coverage. Opponents of the amendment explained that the existing coverage formula, combined with the context-sensitive bailout process, struck a more appropriate balance between remedying and deterring discrimination in jurisdictions with a pervasive history of discrimination on the one hand and releasing jurisdictions from coverage if Section 5 was no longer necessary on the other. The amendment was defeated by a vote of 96-318. *Id.* at H5204-05.

Another amendment proposed by Rep. Lynn Westmoreland (R-GA), H. AMDT. 1186 (offered July 13, 2006), would have provided for an expedited, proactive bailout procedure placing a significant new burden on the DOJ. Rep. Sensenbrenner explained that the amendment would require DOJ officials to travel to nearly 900 jurisdictions each year to review voluminous voting records and interview thousands of individuals to determine whether all of the jurisdiction's voting changes were submitted for preclearance and that all other bailout criteria had been met. *See* 152 CONG. REC. H5199 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner). Such a

regime would make the VRA administratively ineffective and ultimately disadvantage minority voters by frustrating Congress's goal of continuing to target those jurisdictions with a history of entrenched voting discrimination. *See id.* at H5199-200. The amendment was defeated by a vote of 118-302. *Id.* at H5206-07.

Congress's thorough consideration of these amendments underscores the careful attention that Congress has given to the individual provisions of Section 5 during each reauthorization to ensure that they remain properly tailored to protect minority voting rights while respecting the interests of covered jurisdictions.

D. The 2006 Reauthorization Reflected A Bipartisan Consensus And Received Significant Support From Covered Jurisdictions.

1. The Voting Rights Act has enjoyed strong bipartisan support throughout its history, including renewal under four Republican Presidents and with both Democratic and Republican majorities in Congress.[7] As Rep. Mel Watt (D-NC) observed in

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[7] The 1970 renewal occurred under President Nixon (Pub. L. No. 91-285, 84 Stat. 314 (signed June 22, 1970)) (Democratic majorities in both Houses); the 1975 renewal occurred under President Ford (Pub. L. No. 94-73, 89 Stat. 402 (signed Aug. 6, 1975)) (Democratic majorities in both Houses); the 1982 renewal occurred under President Reagan (Pub. L. No. 97-205, 96 Stat. 131 (June 29, 1982)) (Democratic majority in House and Republican majority in Senate); and the 2006 renewal occurred under President George W. Bush (Pub. L. No. 109-246, 120 Stat.

introducing the 2006 reauthorization bill: "It is not a Republican bill, it is not a Democratic bill .... [It] is a bipartisan, bicameral bill that unites us as a country." *Rep. Watt Comments on Introduction of Bicameral/Bipartisan Voting Rights Act Reauthorization Bill*, U.S. FED. NEWS, May 2, 2006, *available at* 2006 WLNR 8232980.

As discussed *supra*, in 2006 Congress responded to the overwhelming evidence of continuing discrimination in the record by considering, but ultimately rejecting, several proposed amendments that would have weakened the VRA's protections. The VRA was ultimately reauthorized with strong support from both parties. Former Speaker of the House Dennis Hastert (R-IL) praised Congress's bipartisan effort to protect minority voters: "Today, Republicans and Democrats have united in a historic vote to preserve and protect one of America's most important fundamental rights – the right to vote." *Speaker Hastert Comments on Reauthorization of Voting Rights Act*, U.S. FED. NEWS, July 13, 2006, *available at* 2006 WLNR 12133683. The 390-33 vote for passage of the VRA in the House is the largest number of votes in favor of passage in the history of VRA reauthorization.

2. Appellant claims that Section 5 imposes a "scarlet letter on residents of covered jurisdictions." MUD Br. 58. However, Members from covered jurisdictions disagree, as evidenced by their broad

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577 (signed July 27, 2006)) (Republican majorities in both Houses).

support for reauthorization. Of the 110 representatives from covered jurisdictions, 90 voted in favor of reauthorization. 152 CONG. REC. H5204-05 (daily ed. July 13, 2006). The 2006 reauthorization thus reflects a particularly strong example of this Court's observation in *Garcia v. San Antonio Metro Transit Auth.* that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. 528, 552 (1985); *cf. Georgia v. Ashcroft*, 539 U.S. 461, 484 (2003) ("And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new [districting] plan."). The Members of Congress most attuned to the particular benefits and burdens of Section 5 struck the balance strongly in favor of renewal.

3. Moreover, the record contains numerous letters from covered states and local government organizations both documenting continued discrimination and expressing support for reauthorization. A coalition of organizations including the Council of State Governments, the National Conference of State Legislatures, the National Association of Secretaries of State, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors supported reauthorization as part of the "ongoing partnership among all levels of government" needed to fully integrate minority voters into the electoral process. *See* 152 CONG. REC. H5146 (daily ed. July 13, 2006). Given the wide-ranging and diverse

support for reauthorization in 2006, this Court should defer to Congress's considered judgment.

III. The VRA Regulates The Political Process, Voting, And Race – Areas Where Congress Acts At The Height Of Its Powers And Merits Special Deference From This Court.

As this Court has repeatedly recognized, Congress is due special deference when it acts to protect suspect classes, defend fundamental rights, or make inherently political determinations about the electoral process. The VRA stands at the intersection of this trio of congressional powers.

The intersection of these three areas means that Congress acted at the apogee of its authority in reauthorizing the VRA. Indeed, as appellant notes, "[W]hen Congress addresses matters involving a fundamental right or suspect class, constitutional violations by state actors are more likely to have occurred and a congressional record extensive enough to justify prophylactic legislation will generally be easier to amass." MUD Br. 35.

A. The Constitution And This Court Recognize A Robust Role For Congress In Regulating The Political Process.

1. The text of the Constitution envisions a special role for Congress in regulating elections and structuring the political process. The Elections Clause grants Congress the authority to "at any time by Law make or alter . . . Regulations" governing "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I, § 4, cl. 1. Thus, this Court has long recognized that

"the regulations made by Congress [addressing elections] are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Ex parte Siebold*, 100 U.S. 371, 384 (1879). And this Court has reaffirmed Congress's "'power to override state regulations' by establishing uniform rules" governing federal elections. *Foster v. Love*, 522 U.S. 67, 69 (1997) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995)).[8]

This Court has also recognized that the Elections Clause would empower Congress to regulate a broad swath of conduct. It has adopted the "commonsense view" that the term "Manner of holding Elections" encompasses such matters as "registration, supervision of voting, protection of votes, [and] prevention of fraud and corrupt practices." *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001). Those are, of course, precisely the kinds of laws covered by Section 5.

Similarly, this Court has recognized that Congress, not the judicial branch, bears the primary responsibility for fulfilling the promises embodied in the Guarantee Clause, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S.

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[8] This appeal does not itself implicate federal elections, but applications of the VRA involving federal contests would be independently valid under the Elections Clause. In any event, the Elections Clause reflects the Framers' recognition of Congress's special expertise with respect to the electoral process

CONST. art. IV, § 4, cl. 1. This is because Congress is best equipped to address such matters as how to ensure political fairness in democratic elections. By contrast, this Court has found "[i]t is hostile to a democratic system to involve the judiciary" in such determinations. *Colegrove v. Green*, 328 U.S. 549, 553-54 (1946) (plurality opinion); *see also Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) (treating political gerrymandering claims as nonjusticiable due to a lack of "judicially discernible and manageable standards for adjudicating" them); *Luther v. Borden*, 48 U.S. 1, 42 (1849) (stating that enforcement of the guarantee clause "rests with Congress"). Consequently, "in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

Deference to Congress is particularly appropriate in this context because its Members are more intimately involved with and more knowledgeable about the electoral process than are the courts. They also hail from every political subdivision in the Nation and bring to bear local knowledge of the effects of racial discrimination on their districts' electoral systems. Therefore, they are best able to make choices between competing theories of political representation. *See Colegrove*, 328 U.S. at 556 (plurality opinion).

2. The 2006 reauthorization rested on a fact-based and complex inquiry into the best way to address the lingering effects of discrimination on the electoral process. The record before Congress left no doubt that widespread voting discrimination persists

in covered jurisdictions, and the reauthorization therefore hinged upon a political judgment regarding the proper response. The VRA falls squarely within the core of Congress's unique institutional expertise in regulating the political process, and Congress properly used this expertise to provide the desired political guidance by overwhelmingly reauthorizing Section 5 for another 25 years.

B. The Constitution Grants Congress Broad Powers To Pass Legislation Protecting Racial Minorities.

1. The Constitution also expressly grants Congress a central role in protecting minority groups against racial discrimination. U.S. CONST. amend XIV, § 5; U.S. CONST. amend. XV, § 2. "[T]he remedy for the violation of the Fourteenth and Fifteenth Amendment was expressly not left to the courts. The remedy was legislative. . . ." Statement of Sen. Oliver Morton, 42d Cong., 2d Sess. 525 (1872); *see also* Michael W. McConnell, *Institutions and Interpretations: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 194-95 (1997) ("The historical record shows that the framers of [the Fourteenth Amendment] expected Congress, not the Court, to be the primary agent of its enforcement. . . . [T]he Court should give respectful attention – and probably the presumption of constitutionality – to the interpretive judgments of Congress.").

2. Accordingly, as this Court has recognized, Congress's remedial and prophylactic powers are at their strongest when it legislates to remedy or prevent discrimination against historically disadvantaged groups that receive the protections of

heightened judicial scrutiny. *See, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735-36 (2003); *accord* MUD Br. 35. Racial minorities are the prototypical example of a suspect class under the Fourteenth Amendment, and this Court has consistently subjected claims of discrimination on the basis of race or ethnicity to the strictest scrutiny. *See Johnson v. California*, 543 U.S. 499, 515 (2005). Indeed, in modern times this Court has never struck down a congressional statute protecting the right to vote against racial discrimination.

3. The clear purpose of the VRA is to remedy ongoing discrimination against racial and ethnic minorities who have historically faced widespread exclusion from the political process. Despite appellant's protestation to the contrary, *see* MUD Br. 29, the 2006 reauthorization fits squarely within Congress's "wide latitude" to enact measures to "remedy or prevent unconstitutional actions" against such groups. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997).

C. The Constitution Also Grants Congress Special Authority To Safeguard Fundamental Rights.

1. Congress also has broad powers under the Reconstruction Amendments to enact legislation protecting fundamental rights. This Court's precedents recognize that, as with protecting members of traditionally suspect classes, Congress's powers are at their greatest when it acts to safeguard fundamental liberties. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding Congress's abrogation of state sovereign immunity under Title II of the

Americans with Disabilities Act with respect to the fundamental right of access to the courts); *see also United States v. Georgia*, 546 U.S. 151 (2006) (approving the abrogation of state sovereign immunity under Title II of the ADA in cases alleging violations of fundamental rights under the Eighth Amendment); *accord* MUD Br. 35.

2. The right to vote is the quintessential fundamental right; indeed, the right to participate in the electoral process is a foundational right "preservative of all [other] rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969). Denial or dilution of the right to vote is subject to heightened scrutiny. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966). Thus, Congress is acting at the height of its authority when it legislates in the VRA to protect voting rights. *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966) ("Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.").

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In 2006, after meticulous and extended consideration, Congress determined that the provisions of Section 5 have not yet "outlived their usefulness." *City of Rome v. United States*, 446 U.S. 156, 180 (1980). In making this determination, Congress acted at the height of its powers in regulating the three intersecting areas of voting, race, and political rights. Congress's judgment is therefore entitled to substantial deference from this Court. Accordingly, as the District Court properly

held, Congress's decision to extend the VRA passes muster under *any* constitutional test, whether rationality review under *Katzenbach* or the "congruence and proportionality" test in *City of Boerne*. *See* J.S. App.56-144 (applying each of these tests).

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., Attorney General
of the United States of America, et al.,

Appellees.

**On Appeal From The
United States District Court For The
District Of Columbia**

**BRIEF OF *AMICI CURIAE*
FORMER REPUBLICAN OFFICEHOLDERS
IN SUPPORT OF APPELLEES**

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are Republican legislators and executive officials who formerly served at the highest levels of federal and state government. *Amici* include William S. Cohen, former Secretary of Defense and Member of the U.S. Congress; Robert "Bob" Dole, former Senate Majority Leader and 1996 Republican Presidential Nominee; former U.S. Representative Amory "Amo" Houghton, Jr.; Richard Lewis "Dick" Thornburgh, former Governor of Pennsylvania and U.S. Attorney General; and former Governor of Massachusetts, William F. Weld.[2]

Amici support Congress's decision in 2006 to reauthorize Section 5 of Voting Rights Act of 1965 ("VRA"), Pub. L. No. 89-110, 79 Stat. 439 (1965), through the enactment of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) ("VRARA"). *Amici* would also stress that even after reauthorization, the VRA remains flexible, allowing political

---

[1] No counsel for a party authored any part of this brief. No person or other entity other than *amici* or their counsel contributed monetarily to the preparation and submission of this brief. J. Gerald Hebert, counsel for *amici curiae* Bailed Out Jurisdictions, serves as Executive Director of the Campaign Legal Center. He took no part in authoring any part of this brief. Correspondence from counsel of record for Appellees and Appellant consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Additional information and biographies of the *amici curiae* can be found in Appendix A to this brief.

subdivisions still covered by Section 5 to "bail out" if they can reasonably demonstrate that they have fully complied with the VRA, and that all aspects of their voting and election processes over the last decade were non-discriminatory.

Amici submit this brief for two principal purposes. First, *amici* wish to highlight the bipartisan nature of the support for the 2006 renewal of the Act, and for all reauthorizations of the Act in the past. Second, *amici* argue that the reason behind the bipartisan support for the VRARA – as well as for past reauthorizations – was the extensive legislative record compiled by Congress that demonstrated both the efficacy of the Act and the remaining discrimination in voting that necessitated its renewal.

SUMMARY OF ARGUMENT

Support for the Voting Rights Act has always transcended political party and ideology. The 1965 Act had been championed not only by Democratic President Lyndon B. Johnson, but also by Republican legislators in the U.S. House of Representatives and Senate. Indeed, as noted by former Senate Majority Leader and 1996 Republican Presidential nominee Bob Dole:

> [I]t's a little-remembered fact that a greater percentage of Republicans voted for the Voting Rights Act of 1965 than did Democrats. In the Senate, all but two Republicans

> supported the act on final passage – 93 percent of the Republican caucus, compared with 73 percent of Senate Democrats. On the House side, 82 percent of Republicans supported the Act's passage, as did 78 percent of Democrats.

Bob Dole, *Grand Old Legacy*, WASH. POST, August 6, 2005, at A19.

The significant bipartisan support that was evident in the original enactment of the VRA carried over to the subsequent reauthorizations of its temporary provisions. The temporary provisions have been reauthorized four times by bipartisan majorities in the House and Senate, and these reauthorizations signed into law by four Republican presidents. James Thomas Tucker, *The Politics of Persuasion: Passage of The Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 206 (2007).

One of the crucial temporary provisions of the VRA is Section 5, *codified at* 42 U.S.C. § 1973c, which requires certain jurisdictions to "preclear" any proposed change affecting voting with either the U.S. Attorney General or the U.S. District Court for the District of Columbia before implementing the change. Initially, Section 5 covered only seven states in full that had met certain "triggers" under Section 4 of the VRA, *codified as amended at* 42 U.S.C. § 1973b(b), relating to their voting practices and registration rates in 1964. Section 5 has been extended in each of the four reauthorizations of the VRA, and its coverage expanded to include additional jurisdictions.

It is the most recent extension of Section 5 that is the focus of the challenge before this Court. Even as compared to the prior bipartisan extensions of Section 5, the VRARA enjoyed unprecedented, almost unanimous political support.

The bipartisan legislative support for the 2006 reauthorization was founded in the recognition that Section 5 has been crucial to eliminating barriers to the full enfranchisement of minority voters, and remains essential to eradicating the remaining vestiges of discrimination in voting. In the 2006 reauthorization, the House and Senate, led by Republican legislators, painstakingly amassed an extensive record detailing both the progress achieved due to the temporary provisions of the VRA, as well as the disparities in political participation across different races that persist today. The near-unanimous bipartisan vote for the VRARA can be ascribed to the powerful record compiled by the 2006 Congress.

The bipartisan support can also be attributed to the flexibility built into the preclearance mechanism. Congress recognized that some jurisdictions that remain subject to Section 5 under the 2006 reauthorization may be able to show a clean record of nondiscrimination in their voting processes; for this reason, the VRARA retained the "bail out" option to allow such jurisdictions to terminate coverage. *Amici* would also emphasize that the 2006 extension of Section 5 is not permanent. Congress will have the opportunity in the future to reassess the need for Section 5 and to take into account any changes in

voting patterns and practices that ensue in the coming years.

Petitioner Northwest Austin Municipal Utility District Number One now demands that this Court disturb the consensus of both major parties that Section 5 remains necessary to realize equal voting rights, and declare the 2006 extension of the preclearance requirement unconstitutional. *Amici* respectfully urge this Court to reject Petitioner's challenge to the 2006 reauthorization and to affirm the decision of the district court below upholding the VRARA. *See Northwest Austin Mun. Utility Dist. Number One v. Mukasey (NAMUDNO)*, 573 F. Supp. 2d 221 (D.D.C. 2008). The legislative record contains more than sufficient evidence of contemporary voting discrimination to justify Congress's decision to reauthorize Section 5 for an additional 25 years. Furthermore, the 2006 legislative record is at least as extensive as the records compiled by Congress in its earlier reauthorizations of Section 5 of Act, and these records have been deemed adequate to support the earlier renewals by this Court. *See City of Rome v. U.S.*, 446 U.S. 156 (1980) (upholding 1975 reauthorization of Section 5); *see also South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Georgia v. U.S.*, 411 U.S. 526 (1973); *Lopez v. Monterey County*, 525 U.S. 266 (1999).

Several decades after President Lyndon B. Johnson signed the 1965 VRA in law, President Ronald Reagan paid tribute to the Act upon signing the 1982 reauthorization of the Act, stating: "[T]he right to

vote is the crown jewel of American liberties, and we will not see its luster diminished. The legislation that I'm signing demonstrates America's commitment to preserving this essential right." President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), *available at* http://www.reagan.utexas.edu/archives/speeches/1982/62982b.htm. *Amici* submit that his statement holds true today, and applies equally well to the most recent authorization of the Act. The overwhelming bipartisan support for the VRARA, as well as for prior reauthorizations of the Act, is a testament to the continuing importance of Section 5 to this nation's efforts to achieve full and equal participation by all its citizens in the electoral process.

ARGUMENT

I. From Its Enactment to the Present Day, the VRA Has Won Enduring Bipartisan Support.

The reauthorization of Section 5 in 2006 was characterized by bipartisan leadership and almost unanimous approval. This cooperation in 2006 continued the pattern of bipartisan support that was established in the reauthorizations of the Act in 1970, 1975 and 1982. As stated by Senator Mitch McConnell (R-KY), then Senate Majority Whip, "We have, of course, renewed the Voting Rights Act periodically since [its enactment], overwhelmingly, and on a bipartisan basis, year after year after year because

Members of Congress realize this is a piece of legislation which has worked." 152 CONG. REC. S7975 (July 20, 2006) (statement of Sen. McConnell).

A. 1970 Reauthorization.

In the 1970 renewal of the VRA, Congress reauthorized Section 5 for an additional five years, and expanded Section 5 to cover jurisdictions that failed to meet certain voting benchmarks in 1968. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970). The reauthorization followed Congress's review of the progress made since the enactment of the VRA, which included 14 days of hearings conducted by the House and Senate. S. REP. NO. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 184. The decision to reauthorize was based on Congress's conclusion that a five-year extension was "both reasonable and necessary to permit the dissipation of the long established political atmosphere and tradition of discrimination in voting because of color in those States and subdivisions in which literacy tests and low registration have gone hand in hand." H.R. REP. NO. 109-478, at 9 (2006).

Based on this legislative record, large bipartisan majorities voted in favor of reauthorizing Section 5. The Senate approved the reauthorization by a 64-12 vote, and the House approved it by a 272-132 vote. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act*, 86 TEX. L. REV. 667, 686-87 (2008), *citing Congress Lowers Voting Age*,

Extends Voting Rights Act, 26 CONG. Q. ALMANAC 192, 194-98 (1970).

B. 1975 Reauthorization.

In 1975, Congress extended Section 5 for an additional seven years, and expanded its coverage to jurisdictions that used a test or device in 1972 and had registration rates of less that 50 percent. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975). Congress also extended the protections of the Act to "language minorities" to ensure that the rights of citizens with limited English abilities were not abridged or diminished. *See* 42 U.S.C. §§ 1973b(f), 1973aa-1a, 1973*l*.

The 1975 reauthorization was grounded in the substantial record compiled by Congress of both widespread voting discrimination in the covered jurisdictions and non-compliance with the Act. S. REP. No. 97-417, 1982 U.S.C.C.A.N. 177, 185-86. After 13 days of hearings in the House and seven days of hearings in the Senate, Congress concluded that the preclearance requirement remained necessary because "there are continuing and significant deficiencies yet existing in minority registration and political participation." H.R. REP. No. 109-478, at 9 (2006), *citing* H.R. REP. No. 94-196, at 7 (1975).

Again, the strong record translated into strong support from both Republicans and Democrats for the reauthorization. The Senate passed the final bill 77-12, and the House agreed to the Senate version

without convening a conference in a vote of 346-56. Kousser, *supra*, at 706, *citing Congress Clears Voting Rights Act Extension*, 31 CONG. Q. ALMANAC 521, 529-33 (1975).

C. 1982 Reauthorization.

In 1982, Congress extended Section 5 of the VRA for an additional 25 years. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

Again the reauthorization was preceded by a detailed and thorough examination by both the House and Senate of developments in voting practices since the 1975 reauthorization. The testimony received during the 27 days of hearings conducted by the House and Senate highlighted that the direct barriers to minority political participation had been replaced by more "sophisticated" forms of discrimination that "dilute minority voting strength." S. REP. NO. 97-417, 1982 U.S.C.C.A.N. 177, 187. Congress nevertheless concluded that "continued manipulation of registration procedures and the electoral process ... effectively exclude minority participation from all stages of the political process," and that reauthorization of Section 5 was consequently warranted. H.R. REP. NO. 109-478, at 10, *citing* H.R. REP. NO. 97-227, at 14 (1982).

In light of the extensive record, reauthorization again garnered the support of substantial majorities

of the Members of both parties in the House and Senate.

Indeed, the principal resistance to the 1982 amendments related to proposed amendments to Section 2 of the Act, *codified at* 42 U.S.C. § 1973, not to the extension of Section 5. In its reauthorization bill, the House had amended Section 2 to clarify that a claim under this section could rest solely on a showing that a practice is applied "in a manner which results in a denial or abridgment" of the right to vote based on race, and need not allege discriminatory intent. *See* H.R. 3112, 97th Cong. (as passed by the House, Oct. 5, 1981). The amendment to Section 2 in the House bill drew opposition in the Senate, which threatened to derail the extension of Section 5. It was former Senator Bob Dole (R-KS) who took the lead in formulating a compromise amendment to Section 2. S. REP. No. 97-417, 1982 U.S.C.C.A.N. 177, 180; Thomas M. Boyd, Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1414-16 (1983). The "Dole Compromise," as it came to be known, was widely credited as rescuing the reauthorization from the dissension over Section 2. *See, e.g.*, Benjamin Taylor, *Voting Rights Act Endorsed; Reagan Backs Compromise*, BOSTON GLOBE, May 4, 1982; Hedrick Smith, *Dole Finding Role of the Moderate Suits Him*, N.Y. TIMES, May 14, 1982. Former Senator Dole would later recall his role with pride, stating that "[w]hen the Voting Rights Act came up for reauthorization in 1982, I was pleased to craft the

compromise extending its 'pre-clearance' enforcement provision for 25 years and ensuring that voting rights violations could be challenged in federal court." Dole, *supra*, A25.

The Senate ultimately voted overwhelming 85-8 in favor of the final bill, and extended Section 5 for an additional 25 years. Kousser, *supra*, at 707, *citing Voting Rights Act Extended, Strengthened*, 38 CONG. Q. ALMANAC 373, 376 (1982).

D. 2006 Reauthorization.

In 2006, Congress reauthorized Section 5 for an additional 25 years. VRARA, § 4. Mirroring the earlier renewals of Section 5, the 2006 reauthorization was based on an extensive legislative record, as discussed in *infra* Section II, and enjoyed broad bipartisan support.

The House bill was introduced by then-Chairman of the House Judiciary Committee Jim Sensenbrenner (R-WI), who had announced as early as July 2005 his plan to advocate for early reauthorization. *See* H.R. 9, 109th Cong. (2006); *see also* Tucker, *supra*, at 217, *citing* Rep. Sensenbrenner to Introduce 25-Year Voting Rights Extension Legislation, Calls for Bipartisan Approach to Civil Rights Issues, U.S. FED. NEWS, July 10, 2005. He led the reauthorization effort with Ranking Member John Conyers (D-MI), Representative Steve Chabot (R-OH), Chairman of the House Judiciary Subcommittee on the Constitution, and Representative Mel Watt (D-NC), Chairman of

the Congressional Black Caucus. Tucker, *supra*, at 213-17. The bill was co-sponsored by a total of 152 Members, including the House leadership at that time, Speaker Dennis Hastert (R-IL) and House Minority Leader Nancy Pelosi (D-CA).

The Senate bill was sponsored by Senator Arlen Specter (R-PA), then-Chairman of the Senate Judiciary, and enjoyed the support of 57 co-sponsors. S. 2703, 109th Cong. (2006) (enacting H.R. 9, as amended). Among the co-sponsors was the leadership of both parties at that time, including Senate Majority Leader Bill Frist (R-TN) and Senate Minority Leader Harry Reid (D-NV).

President George W. Bush was also an early supporter of the renewal of the VRA, stating publicly in December 2005 while signing a bill honoring Rosa Parks that "Congress should renew the Voting Rights Act."[3] Further, on the morning of the House floor vote on the reauthorization, the White House offered crucial support, issuing a statement that "The Administration is strongly committed to renewing the Voting Rights Act, and therefore supports passage of H.R. 9."[4]

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[3] *See* Tucker, *supra*, at 211, *citing* The White House, President Signs H.R. 4145 to Place Statue of Rosa Parks in U.S. Capitol, Dec. 1, 2005.

[4] The Statement of Administration Policy: H.R. 9 – Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (July 13, 2006) is available at http://www.whitehouse.gov/omb/legislative/sap/109-2/hr9sap-h.pdf (last visited Mar. 20, 2009).

In the House, the reauthorization legislation passed by a recorded vote of 390-33; in the Senate, the legislation passed by a unanimous vote of 98-0.

Members of both political parties hailed the unity of the parties and recognized that the cooperation related to the continued importance of the VRA to the health of American democracy. Then-Senator Barack Obama (D-IL) stated that "at a time when Americans are frustrated with the partisan bickering that too often stalls our work, the refreshing display of bipartisanship we are seeing today reflects our collective belief in the success of the act." 152 CONG. REC. S7984 (July 20, 2006) (statement of Sen. Obama). Then-Senate Majority Leader Bill Frist (R-TN) noted that: "Today the Senate is standing together to protect the right to vote for all Americans. We stand together, putting aside partisan differences, to ensure discrimination at the voting booth remains a relic of the past." 152 CONG. REC. S7965 (July 20, 2006) (statement of Sen. Frist).

President Bush signed VRARA into law on July 27, 2006, noting that "we've made progress toward equality," but recognizing that "the work for a more perfect union is never ending."[5]

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[5] President's Remarks on Signing The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 42 WKLY. COMP. PRES. DOC. 1392 (July 27, 2006).

II. The Bipartisan Support for the 2006 Reauthorization Was Grounded in Congress's Recognition that Section 5 Is Still Needed to Eliminate the Barriers to Minority Voting that Persist Today.

In each of the reauthorizations of the VRA, the strong bipartisan support for extending Section 5 has reflected Congress's conviction that the preclearance mechanism remained necessary to deter voting discrimination and to ensure the full enfranchisement of all citizens regardless of race. Further, in each of the reauthorizations, this conviction was grounded in an extensive legislative record that both demonstrated the progress made under the Act and the remaining problems of discrimination in voting.

Amici, some of whom were personally involved in past reauthorizations of the Act, can attest to the effort and deliberation underlying earlier extensions of Section 5. *Amici* also submit that the reauthorization in 2006 was no exception to this tradition. The bipartisan consensus in favor of the VRARA is attributable to the comprehensive record compiled by the House and Senate in their review of the temporary provisions of the Act. This record is at least as extensive as the records that supported earlier reauthorizations of the Act, and thus is more than sufficient to demonstrate that Congress again acted reasonably in extending Section 5 in 2006.

A. The House and Senate Compiled a Substantial Record to Support the Extension of Section 5 in 2006.

From October 18, 2005, through March 8, 2006, the Subcommittee on the Constitution of the House Judiciary Committee, under the leadership of Representative Steve Chabot, then-Chairman of the Subcommittee, held ten oversight hearings, gathering testimony from 39 witnesses. H.R. REP. NO. 109-478, at 5. After receiving additional written testimony from the Department of Justice, and other interested organizations and private citizens, the Committee's record encompassed over 12,000 pages of testimony and documentary evidence from over 60 witnesses. *Id.* The Subcommittee held an additional two legislative hearings and received testimony from another seven witnesses. *Id.*

Subcommittee Chairman Chabot stressed the size and depth of the congressional record, stating that "we have given this issue more time and more attention than any single issue since I became chairman of the Subcommittee on the Constitution of the Judiciary Committee 6 years ago." 152 CONG. REC. H5148 (July 13, 2006) (statement of Rep. Chabot). This sentiment was echoed by Committee Chairman Sensenbrenner, who noted that "based upon the committee's record . . . it is one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years that I have been honored to serve as a Member

of this body." 152 CONG. REC. H5143 (July 13, 2006) (statement of Rep. Sensenbrenner).

The voluminous record developed by the House Judiciary Committee was submitted to the Senate Judiciary Committee on April 27, 2006. Although the Senate benefited from the record gathered by their colleagues in the House, the Senate Judiciary Committee and its Subcommittee on the Constitution also conducted an additional nine hearings. S. REP. NO. 109-295 (2006), at 10.

Importantly, the House and Senate also took into account a diverse array of viewpoints, hearing testimony both in favor and against reauthorization, as well as allowing and voting on various proposed amendments to the Act. *See, e.g.*, H.R. REP. NO. 109-478, at 123-73 (text and debate of various proposed amendments); Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?* 43 HARV. C.R.-C.L.L. REV. 385, 402 (2008) (discussing wide variety of viewpoints expressed on Section 5 in congressional hearings and debate). The breadth of the testimony compiled attests to the care with which Congress approached the 2006 reauthorization and the balance in the legislative deliberation of the VRARA.

Although dissenting opinions were offered and considered, the legislative record amassed in the House and Senate established the persistence of discrimination in voting and the continued need for

Section 5. The House Judiciary Committee stated unequivocally that "the temporary provisions of the VRA are still needed." H.R. REP. NO. 109-478, at 6. The Committee's report went on to explain:

> Discrimination today is more subtle than the visible methods used in 1965. However, the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice.

Id. The Senate Judiciary Committee reached the same conclusion, stating that: "we recognize the great strides that have been made in the treatment of racial minorities over the last forty years, but extending the expiring provisions of the Voting Rights Act is still necessary to continue to fulfill its purpose." S. REP. NO. 109-295, at 2.

B. The 2006 Record Matches the Legislative Records Developed to Support Earlier Reauthorizations of Section 5.

In reaching the bipartisan conclusion that the reauthorization of Section 5 in 2006 was necessary to effectuate the purposes of the Act, the House and Senate gathered and considered the same types of evidence that Congress had gathered and considered in earlier renewals of the Act. As stated by the House Judiciary Committee, "[d]espite the substantial progress that has been made, the evidence before the Committee resembles the evidence before Congress in

1965 and the evidence that was present again in 1970, 1975, 1982, and 1992." H.R. REP. NO. 109-478, at 6.

The legislative records that supported the 1965 VRA and its later reauthorizations were deemed sufficient by the Supreme Court in *South Carolina* and *City of Rome* to justify Congress's enactment of those laws. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *City of Rome v. U.S.*, 446 U.S. 156 (1980); *see also Georgia v. U.S.*, 411 U.S. 526 (1973). As highlighted by the district court, Congress considered the same categories of evidence in the 2006 renewal as the Supreme Court examined and found significant in upholding the 1975 reauthorization in *City of Rome*, namely: racial differences in registration rates, the representation of minorities in office, and the prevalence of Section 5 objections by the Attorney General. *NAMUDNO*, 573 F. Supp. 2d at 247. Because the legislative record in 2006 thus parallels the earlier records supporting reauthorization, as the following section will review, it serves as ample justification for Congress's exercise of its constitutional authority to extend Section 5.

1. Differences in registration rates

In the 1975 reauthorization, Congress both investigated the progress made in increasing minority registration rates, and documented the race-based disparities in political participation that remained in

at least several covered jurisdictions. *NAMUDNO*, 573 F. Supp. 2d at 265-66.

Similarly, in 2006, Congress highlighted both the progress and the remaining deficits in minority registration and turnout. It noted, for instance, that "the disparities between African-American and white citizens who are registered to vote have narrowed considerably in six southern States covered by the temporary provisions (Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia) and in the 40 counties covered in the State of North Carolina." H.R. REP. NO. 109-478, at 12. However, it also found that certain covered jurisdictions lagged in their equalization of participation rates. In Virginia, in the 2004 election, "black registration was 7 percentage points lower than the national average, black registration was 11 percentage points lower than white registration, and black turnout was 13 percentage points lower than white turnout." S. REP. NO. 109-295 at 11.

The disparities found by Congress in the participation rates of language minorities were yet starker. In the 2004 elections, Latinos registered and turned out at rates roughly 30 percentage points lower nationwide than white voters. *Id.* For instance, in Florida, only 36.7 percent of Hispanic citizens were registered to vote in 1996, compared to 67.8 percent of white citizens. H.R. REP. NO. 109-478, at 29. In Texas, only 41.5 percent of Hispanic citizens were registered in 2004, compared to 61.5 percent of white citizens. *Id.*

2. Representation of minorities in federal, state and local office

In compiling the record to support the 1975 reauthorization, Congress considered both the increase in minority elected officials, and the shortfalls in minority representation, particularly at the statewide level. *NAMUDNO*, 573 F. Supp. 2d at 265-66.

In 2006, Congress acknowledged the great strides made in minority representation, noting that in 1964, there were only 300 African-Americans in public office, whereas "today there are more than 9,100 black elected officials, including 43 members of the United States Congress, the largest number ever." S. REP. NO. 109-295, at 12.

Again, however, Congress found that as in 1975, the number of African-American representatives in State legislatures did not reflect the number of African Americans in the general population. H.R. REP. NO. 109-478, at 33. "For example, in southern states such as Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina, where African Americans constitute 35 percent of the population, African Americans made up only 20.7 percent of the total number of State legislators." *Id.* Moreover, the House Judiciary Committee found that in Mississippi, Louisiana, and South Carolina, African Americans have yet to be elected to any statewide office. *Id.* at 34.

The Committee also found that the number of language minority officials elected to office was not in

proportion to the size of their populations. Although more than 15 million citizens of Hispanic origin reside in the United States, Latinos constitute only 0.9 percent of the total number of elected offices in the country. *Id.* at 33-34. The Committee also noted that the number of Asian-American elected officials did not match the growth of the Asian-American population. It documented, for instance, that the number of Asian Americans residing in the United States rose from 1.2 million in 1970 to 12 million in 2004, but that the number of Asian American elected officials had only increased from 120 in 1978 to 346 in 2004. *Id.*[6]

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[6] In response to critics who argue that the election of President Barack Obama in 2008 undercuts Congress's findings regarding race-based voting patterns, *amici* would highlight the analysis of the 2008 election in the friend-of-the-court brief filed by Nathaniel Persily, Stephen Ansolabehere and Charles Stewart III. *See* Brief for Nathaniel Persily, Stephen Ansolabehere, and Charles Stewart III as *Amici Curiae* on Behalf of Neither Party (Feb. 26, 2009) ("Persily Br."). In their review of the results of the 2008 Presidential election, these professors of law and political science found no decline in racially polarized voting in covered states, nor a "disruption in the well-known correlations between race and vote choice." Persily Br. at 3.

They noted that Obama's victory was due to gains he made relative to the performance of the 2004 Democratic presidential nominee among racial minorities nationwide and whites in *noncovered* jurisdictions. *Id.* In *covered* states, however, Obama received only 26 percent of the white vote. Indeed, the six states with the lowest percentage of whites who reportedly voted for Obama are covered states, and three of those states (Alabama, Mississippi, and Louisiana) reported a drop in the white vote for the Democratic nominee since 2004. *Id.* at 10. Thus, far from

(Continued on following page)

3. Section 5 objections interposed

As in the 1975 reauthorization, Congress also reviewed the number and nature of the objections interposed by the Attorney General to submitted voting changes in its deliberation on the VRARA.

The House Judiciary Committee Report noted that since 1982, the Department of Justice objected to more than 700 voting changes because they were determined to be discriminatory. H.R. REP. NO. 109-478, at 36. In nine of the sixteen states covered by Section 5, more objections were interposed after 1982 than before that year. H.R. REP. NO. 109-478, at 36, *citing Protecting Minority Voters: The Voting Rights Act at Work 1982-2005*, NATIONAL COMMISSION ON THE VRA 54 (Feb. 2006).

Congress also found that the types of voting changes submitted by covered jurisdictions – many of which had been deemed discriminatory by the Attorney General – resembled the types of changes submitted in earlier periods. The House Judiciary Committee noted that "voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory

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marking a watershed in electoral participation, the 2008 election demonstrates the "intransigence of racial differences in voting patterns." *Id.* at 3.

annexations and deannexations; setting numbered posts; and changing elections from single member districts to at-large voting and implementing majority vote requirements." *Id.* at 36.

The evidence reviewed in the foregoing subsections represents but a fraction of the record amassed by Congress in the 2006 reauthorization. As noted by the district court, Congress also reviewed additional categories of evidence that demonstrated the continuing need for the preclearance mechanism, including "more information request" letters, judicial preclearance suits, Section 5 enforcement actions, Section 2 litigation, appointment of federal election observers, and statistics on racially polarized voting. 573 F. Supp. 2d at 247.

However, even a sampling of the massive record reveals the similarity of the evidence gathered in the 2006 reauthorization and the evidence underlying previous reauthorizations, and demonstrates that widespread discrimination against minority voters persists to this day. As summarized pithily by Chairman Sensenbrenner: "We need the Voting Rights Act, and we need the Voting Rights Act because in the last 25 years the covered jurisdictions have not come clean." 152 CONG. REC. H5164 (July 13, 2006) (statement of Rep. Sensenbrenner).

The bipartisan consensus that the VRA remains necessary to achieve the full enfranchisement of

minority voters rests on a substantial legislative record that resembles the record supporting the 1975 reauthorization, upheld in *City of Rome*, as well as the records supporting the other reauthorizations of the Act. *Amici* thus respectfully urge the Court to find that the 2006 reauthorization of Section 5 represents a valid exercise of Congress's authority under the Constitution to remedy the continuing problem of racial discrimination in voting.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 2009

Respectfully submitted,

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Appendix A

The following Republican officeholders constitute the *amici curiae* who submit the foregoing brief:

- William S. Cohen. Mr. Cohen served as a U.S. Representative for Maine's Second Congressional District from 1973 to 1979, and as a U.S. Senator for Maine from 1979 to 1997. Mr. Cohen also served as Secretary of Defense under President Bill Clinton from 1997 to 2001. He is currently the Chairman and CEO of The Cohen Group, a business consulting firm based in Washington, D.C.

- Robert "Bob" Dole. Mr. Dole served as a U.S. Representative from Kansas from 1961 to 1969, and as a U.S. Senator for Kansas for almost three decades, from 1969 to 1996. He served as Chairman of the Senate Finance Committee from 1981 to 1985. Mr. Dole was elected Senate Majority Leader in 1984, and served as the leader of the Senate Republicans until he resigned from the Senate in 1996 to pursue his campaign for President of the United States. He is currently special counsel at Alston & Bird, LLP.

- Amory "Amo" Houghton, Jr. Mr. Houghton served as a U.S. Representative from New York, 29th Congressional District. Mr. Houghton is the only former Fortune 500 CEO to have served in the House. There, Mr. Houghton was a member of the House Ways and Means Committee, chaired the

Oversight Subcommittee and was a member of the Trade Subcommittee. Houghton is also a founding member of the Republican Main Street Partnership, which seeks to strengthen the political center, where he now serves as a Board Member.

- Richard Lewis "Dick" Thornburgh. Mr. Thornburgh served as the Governor of Pennsylvania from 1979 to 1987. Thereafter, he served as the U.S. Attorney General under Presidents Ronald Reagan and George H. W. Bush from 1988 to 1991. Prior to his Governorship, Mr. Thornburgh was the U.S. Attorney for the Western District of Pennsylvania, and the Assistant Attorney General for the Criminal Division of the U.S. Department of Justice. He currently is counsel at K&L Gates, LLP.

- William F. Weld. Mr. Weld served as Governor of Massachusetts from 1991 to 1997. Prior to serving as Governor, Mr. Weld served as the U.S. Attorney for Massachusetts and as the Assistant Attorney General for the Criminal Division of the U.S. Department of Justice. Mr. Weld is currently a partner in the law firm of McDermott Will & Emery, LLP.

AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., *et al.*,

Appellees.

**On Appeal From The
United States District Court
For The District Of Columbia**

BRIEF OF *AMICUS CURIAE* GEORGIA GOVERNOR SONNY PERDUE IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

1. Whether §4(a) of the Voting Rights Act, which permits "political subdivisions" of a covered State covered by §5's requirement that certain jurisdictions preclear changes affecting voting with the federal government to bail out of §5 coverage if they can establish a ten-year history of compliance with the VRA, must be available to any political subunit of a covered State when the Court's precedent requires "political subdivision" to be given its ordinary meaning throughout most of the VRA and no statutory text abrogates that interpretation with respect to §4(a).

2. Whether, under the Court's consistent jurisprudence requiring that remedial legislation be congruent and proportional to substantive constitutional guarantees, the 2006 enactment of the §5 preclearance requirement can be applied as a valid exercise of Congress' remedial powers under the Reconstruction Amendments when that enactment was founded on a Congressional record demonstrating no evidence of a persisting pattern of attempts to evade court enforcement of voting rights guarantees in jurisdictions covered only on the basis of data 35 or more years old, or even when considered under a purportedly less stringent rational basis standard.

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*

Amicus Curiae is the Governor of the State of Georgia, Sonny Perdue.[1] Governor Perdue, as the head of the Executive Branch of Georgia government, is ultimately responsible for the execution of all state laws, including those related to elections in the state.

Governor Perdue submits this brief in support of Appellant's position that the 2006 renewal of Section 5 imposes an unconstitutional burden on covered jurisdictions, including Georgia and its political subdivisions. Specifically, Congress' renewal of the preclearance provisions of Section 5 continues complete federal control over election law changes in all previously-covered jurisdictions, regardless of whether the purpose of Section 5 has been served in any of those jurisdictions, as it has been in Georgia. By renewing the preclearance requirements without an adequate basis for doing so, Congress continues to

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[1] As required by Rule 37.3(a) of this Court, *Amicus Curiae* Perdue has received the written consent of all parties to file this brief presented. With the exception of Attorney General Eric H. Holder, Jr., all parties and intervenors consented to the filing of all *amicus curiae* briefs. Counsel for *Amicus Curiae* Perdue requested and received written consent of the Solicitor General on behalf of the Attorney General, and a copy of that consent is filed herewith with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *Amicus Curiae* Perdue states that none of the parties authored this brief in whole or in part, and no person or entity, other than the State of Georgia or Governor Perdue's counsel, made a monetary contribution to the preparation or submission of the brief.

impose upon on the State of Georgia and its political subdivisions the financial and administrative burdens associated with Section 5 compliance that simply are no longer constitutionally defensible.

Equally important to his interest in eliminating the unnecessary hard costs incurred in obtaining the federal government's blessing upon every single change in any law, rule or regulation touching on Georgia elections, Governor Perdue has an interest in correcting the extremely negative and totally erroneous implication of Congress' action. Today's Georgia is not, as Congress suggests, a place where the state or local governments sponsor racial discrimination in the electoral process that must be curbed by the federal government. To the contrary and as the data below shows clearly, Georgia has earned the right to be free from the preclearance requirements of Section 5.

Unless Congress' unconstitutional action and the District Court's erroneous decision are reversed, Georgia can reasonably expect to be subject to Section 5 for the next 22 years and, based on the analyses of Congress and the District Court, Georgia can expect to be subject for many years after the 2006 renewal expires. Because there is no constitutional basis for Congress' 2006 renewal of Section 5, the renewal legislation should be invalidated.

INTRODUCTION AND SUMMARY OF ARGUMENT

Georgia is a covered jurisdiction under Section 5 of the Voting Rights Act. For the past 44 years therefore, neither the State of Georgia nor its hundreds of political subdivisions have been allowed to implement *any* change to *any* law, regulation, policy or procedure related to elections and voting until obtaining preclearance from the federal government under Section 5 of the Voting Rights Act. Under that provision, any electoral change requires that Georgia and those subdivisions prove to the satisfaction of the federal government that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on the basis of race.

Under Congress' 2006 renewal of the preclearance provisions of Section 5, Georgia and all of its subdivisions will continue to be subject to this extraordinary, and originally temporary, burden for at least the next 22 years. At the end of that time, Georgia and its political subdivisions will have been subject to this "temporary" federal supervision for over 67 years, despite the overwhelming evidence that they no longer suffer the ills that originally led to federal oversight.

If allowed to stand, the District Court's decision will also mean that covered jurisdictions can reasonably expect to be subject to federal oversight forever. Under Congress' analysis as adopted by the District Court, there need never be any consideration

of present circumstances; a jurisdiction that engaged in racial discrimination in voting over 40 years ago is presumed to be engaged in that conduct and to intend to continue to be so engaged. No matter what evidence of progress is adduced, there simply will never be enough evidence to allow covered jurisdictions to take off the Section 5 badge of racism. In short, once a racist state, always a racist state.

As the data outlined in this brief clearly demonstrates, nothing is further from the truth in Georgia. With the exception of the 2006 and 2008 election data (both of which were unavailable at the time) Congress had before it every bit of this data when renewing Section 5. That data confirms the testimony of Congressman John Lewis, one of the heroes of the civil rights movement and the longest-serving member of Congress from Georgia, in the most recent Section 5 case from Georgia regarding Georgia's progress from 1965 to the present: "[I]t's a different state, it's a different political climate, it's a different political environment. It's altogether a different world that we live, really." However, Congress ignored the present in favor of the much easier path of looking to an undeniable past. In so doing, Congress assured the unconstitutionality of its action.

No matter which constitutional analysis is used, the renewal fails. Applying the correct analysis, the renewal is not a congruent or proportional remedy. Even using the test that the District Court erroneously applied, the renewal is not rationally related to the alleged ill Congress seeks to cure: perceived racial

discrimination in the electoral process. The renewal is therefore unconstitutional and should have been invalidated by the District Court.

The unconstitutionality of the 2006 renewal of Section 5 is not saved by the bailout provisions of the statute because the bailout provisions are completely illusory for a number of reasons. First, while Georgia is held accountable under the bailout provisions for every single electoral decision those subdivisions make, it has absolutely no authority over those political subdivisions with respect to Section 5. If even *one* of the subdivisions is the subject of a Section 5 objection, the State of Georgia is not eligible for bailout for another 10 years following that objection. Additionally, if even *one* of those subdivisions has ever failed to make a Section 5 submission when one was required, the State of Georgia does not qualify for bailout under the statute. Furthermore, although Georgia cannot bail out unless it can certify that both the State and *all* of its covered political subdivisions are and have been in compliance with Section 5 for the requisite periods, the State has absolutely no authority to compel the subdivisions to provide the information needed to make that showing.

Finally, as a recent Georgia example shows, the interpretation of Section 5 by the Voting Section at the Department of Justice has stretched far afield from the original intent of Section 5, which was to prevent gamesmanship by the covered states in their enactment of electoral law. The practical impact of that change at the Department of Justice is to eliminate any

real possibility for covered jurisdictions to bail out of Section 5.

Both Congress' renewal and the District Court's erroneous opinion completely ignore the present and rely on a flawed bailout mechanism to justify the coverage of any jurisdiction which should not be subject to Section 5. Because the 2006 renewal provisions of Section 5 cannot be constitutionally applied either to Georgia or the other covered jurisdictions, the District Court's decision must be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT CONGRESS NEED ONLY HAVE HAD A RATIONAL BASIS FOR RENEWING THE PRECLEARANCE REQUIREMENTS OF SECTION 5

In analyzing the remedial legislation that is Section 5, the District Court applied the wrong standard. Finding that Congress need only demonstrate a rational basis in the exercise of its remedial powers under the Reconstruction Amendments, the District Court ignored this Court's jurisprudence requiring a much stricter test. Under the correct test, Congress cannot exercise its remedial powers under the Reconstruction Amendments unless the remedy fashioned is congruent and proportional and tailored to address or prevent the conduct in question. Congress did not meet, or even attempt to meet, that standard in its

2006 renewal of Section 5. Instead, Congress based its renewal on outdated data, thereby creating a phantom evil and a resulting remedy that necessarily is neither congruent nor proportional.

A. This Court's Jurisprudence Requires Enforcement Mechanisms under the Fourteenth and Fifteenth Amendments Be Congruent and Proportional to the Alleged Wrong Congress Seeks to Redress

The District Court erroneously rejected Appellant's argument that the renewal of Section 5 could stand only if that action was a remedy congruent and proportional to the harm Congress sought to address – racial discrimination in voting and election law. Instead, the District Court determined that if Congress' action met the rational basis test, that action was constitutional. To support that determination, the District Court concluded that the 2006 renewal was, in reality, remedial legislation enacted under the Fifteenth Amendment rather than under the Fourteenth Amendment, and therefore, a lower standard of review, i.e., the rational basis test, applied.

However, this Court has been clear that the standard of review for Congressional enforcement of the two remedial clauses is "virtually identical." *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001). The District Court's attempt to split the standard and thereby buttress its conclusion was in error and should be rejected by this Court.

B. The Renewal of Section 5 Is Neither Proportional Nor Congruent to the Wrong Congress Claimed to Redress

In order to assess the constitutionality of remedial legislation enacted under the Reconstruction Amendments, a reviewing court must follow a three-step process. First, the court must determine the precise "metes and bounds" of the right in question. *Garrett*, 531 U.S. at 368. Second, the court must find that Congress identified a history or pattern of deprivation of the right in question. *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997). Third, the court must find that the statutory remedy is congruent and proportional to the right that Congress purports to protect or enforce. *Garrett*, 531 U.S. at 372.

In the case at hand, the "metes and bounds" of the right in question – the right to be free from racial discrimination in the electoral process – is undisputed. There is also no dispute that Congress identified some historical deprivations of that right in covered jurisdictions, even though those examples were either extremely dated or did not involve government-sponsored racial discrimination in the electoral process.

However, the 2006 renewal of Section 5 fails the third prong of the analysis miserably. That prong requires the remedy be at least somewhat tailored to redress the harm. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 629 (1999). Remedial legislation which is not

even remotely tailored to redress a particular harm cannot withstand the congruent and proportional test required by this Court. *Garrett*, 531 U.S. at 372.

In its 2006 renewal of Section 5, however, Congress did not even attempt to tailor its remedy to redress racial discrimination that may exist in this country's electoral process. Instead, Congress used an outdated formula to presume that the original covered jurisdictions, including Georgia, still discriminated in the electoral process (and that, conversely, not one of the noncovered jurisdictions engaged in such discrimination).

Although upholding the constitutionality of Section 5 in the past, the Court has long acknowledged that, in singling out certain jurisdictions for Section 5 coverage, Congress' focus must be laser sharp. Beginning with the original challenge to Section 5 when the Court upheld Section 5, it based that conclusion in part on the fact that Section 5 was narrowly aimed at areas of the country where discrimination was "most flagrant." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966); *see also City of Rome v. U.S.*, 446 U.S. 156 (1980) (upholding 1975 renewal).

However, in 2006, Congress punted. When renewing the preclearance provisions of the Voting Rights Act in 2006, it left in place the first coverage formula ever used, which relies on statistics from the Presidential Election of 1964. 42 U.S.C. § 1973c. At the time it was first applied in 1965, that coverage

formula captured the State of Georgia. When Congress renewed the provisions of Section 5 and extended coverage to 2031, it used the same statistics, now 44 years old. H.R. 9, 109th Cong. (2006) (enacted). By the end of the 2006 renewal period, the statistical formula will be nearly 70 years old but still in use, despite the availability of data from thousands of elections during those seven decades.

The result is over-inclusive coverage, which is neither a congruent nor proportional remedy. The data before Congress, as well as data now available from the 2006 and 2008 elections, prove the lack of congruence and proportionality.

1. The Coverage Requirements Are Unconstitutionally Over-Inclusive Because Congress Failed to Address Dramatic Progress by Covered Jurisdictions Such as Georgia

Congress' decision to use clearly outdated information rather than current data precludes any argument that the remedy imposed is congruent and proportional or even has a rational basis. Looking at the information that was available to Congress makes its use of the 41-year-old formula even more egregious.

Georgia provides a prime example. The state has made dramatic progress in 44 years, as was clearly revealed in Congressional hearings. *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose:*

Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 109th Cong. 2891-2939, Serial No. 109-79, Vol. I (2005) (hereafter "Georgia Study" and cited by hearing transcript page). However, in blindly renewing the 1964 coverage formula, it is clear that Congress never even considered that progress.

In its opinion, the District Court attempts to justify Congress' action, concluding that after Congress reviewed registration and turnout rates, looked at the election of minority candidates and examined racial polarization, it reasonably concluded that renewal was warranted. *Northwest Austin Mun. Utility Dist. Number One v. Mukasey*, 573 F.Supp.2d 221, 268 (D.D.C. 2008). The District Court's conclusion is not borne out by the facts or the law.

a. Georgia Demonstrated Dramatic Progress by its Tremendous Increases in African-American Registration and Participation Rates

The original basis for Georgia's coverage under Section 5 was a low rate of voter participation in the 1964 Presidential Election. 42 U.S.C. § 1973c. Since that time, however, Georgia voters, and particularly African-American voters in the state, have clearly experienced full participation in this most basic component of democracy. *Voting Rights Act: The Continuing Need for Section 5: Hearing before the Subcomm. on the Constitution of the House Comm. on*

the Judiciary, 109th Cong. 29, Serial No. 109-75 (2005) (testimony of Ronald Keith Gaddie, Professor of Political Science, the University of Oklahoma).

After each major election, the U.S. Census Bureau conducts a survey of voter registration and participation rates. U.S. Census Current Population Survey (available at http://www.census.gov/cps/). Because the voters self-report their participation in the elections, there is some built-in error. However, the results of the Census surveys are helpful in the recognition of trends both in voter registration and turnout. Georgia Study at 2897.

In 1980, fifteen years after passage of the Voting Rights Act, registration rates by race in Georgia still indicated a large gap. *Id.* at 2926. White voters reported 67% registration, while black voters reported 59.8% registration. *Id.* By 1990 though, this gap had narrowed dramatically, with black voters reporting 57.0% registration and white voters reporting 58.1% registration. *Id.* Most notably, by 2004, the gap had actually flipped, with black voters in Georgia reporting a higher registration rate (64.2%) than white voters in the state (63.5%). *Id.*

Turnout rates for elections have undergone a similar change. In 1980, black voters in Georgia reported turning out at a rate of 43.7%, while their white counterparts reported voting at a rate of 56%. *Id.* at 2927. By 2004, black voters reported ***higher*** turnout rates than whites. *Id.* Black voters reported a

turnout number of 54.4%, while white voters reported 53.6%. *Id.*

In summary, it is indisputable and undisputed that barriers once existed for black voters in Georgia, both with respect to registration and turnout. Those barriers, however, clearly do not exist now. What once was a state where black voters were systemically excluded from voting is now a state where black voters register and participate at rates equal to if not exceeding that of white voters.

b. Georgia Demonstrated Dramatic Progress in its Election of Many More African-American Officials

Georgia's long history of discrimination against African-American voters and officials is undeniable. In 1964, very few African-Americans held public office in the state. The numbers were so low that in 1969 – the earliest date for which statistics are available, and four years after the passage of the Voting Rights Act – of the hundreds of offices at every level across the state, there were only 30 African-American elected officials. Georgia Study at 2929. Although the number began to grow slowly, no real escalation occurred until the 1980s. *Id.*

By 2001, the last date for which statistics are available, the number of African-Americans elected to state or local office in Georgia stood at 611. *Id.* That number constitutes an increase of more than 1,900% from 1969.

Similarly, the African-American Congressional delegation in Georgia has grown exponentially since passage of the Voting Rights Act. Seven years after original passage, Georgia elected its first African-American Member of Congress in the 20th century, when Andrew Young won a district that was only 44% black. Georgia Study at 2906. Today, four out of Georgia's thirteen Members of Congress are African-American; two of those Members are elected from districts that do not contain a majority of black voters. *Id.* at 2908-09. Georgia's African-American Congressmen make up 31% of the state's delegation, exceeding the state's 29% total black population.

In statewide elections, Georgia showed little sign of progress for the twenty years after the passage of the Voting Rights Act. Then, in 1984, the Governor appointed the first African-American statewide officer, choosing Robert Benham to serve on the Georgia Court of Appeals. *Id.* at 2912.[2] That same year, Justice Benham, who now serves on the Georgia Supreme Court, won re-election to the Court of Appeals against three white challengers. Georgia Study at 2912. In 1989, Justice Benham became the first African-American to serve on the Georgia Supreme Court. *Id.* Since that time, he has been re-elected three times, most recently in 2008.

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[2] In Georgia, judges on the Supreme Court and Court of Appeals are elected to six-year terms. GA. CONST. Art. VI, Sec. VII, Par. I.

In 1992, Chief Justice Leah Ward Sears joined Justice Benham on the Georgia Supreme Court, becoming the first African-American woman to serve on that court. *Id.* Georgia's progress is soundly demonstrated by a review of Chief Justice Sears' elections. Following her appointment, Chief Justice Sears won re-election three times. In the 2004 election, she soundly defeated a white conservative who ran against her, despite her opponent's strong support from the Republican Party establishment.[3] *Id.*

Today, three of the seven Justices on the Georgia Supreme Court are African-American. *Id.* Two of the twelve judges on the Georgia Court of Appeals are African-American. *Id.*[4] None of this progress, however, was even considered by Congress when it left the 1964 coverage formula in place and ignored more than 40 years of progress in Georgia.

Even though appellate judges in Georgia must be elected statewide, some political scientists discount judicial elections as lower-profile races. As one who has successfully completed two statewide campaigns, *Amicus Curiae* Perdue disputes the notion that success in any statewide race should be disregarded as an easy task. He also points to Georgia's other

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[3] At the time of Chief Justice Sears' 2004 re-election, the Republican Party was the majority political party in Georgia, as is still the case today.

[4] The Georgia Study indicates that three of the twelve judges on the Court of Appeals are African-American. Since the publication of the study, Judge John H. Ruffin Jr. has retired.

African-American officials elected statewide who serve in two of the highest-profile constitutional offices and who have consistently won re-election in Georgia, a majority-white, majority Republican state. Attorney General Thurbert Baker has won twice, both times in contested elections and both times by substantial margins. Georgia Study at 2913. Likewise, Labor Commissioner Michael Thurmond has also won election and re-election. *Id.*

There are 34 statewide elected officials in Georgia. Today, seven of those positions are held by African-Americans. All were required to and did gain a substantial portion of the white vote in order to win their statewide elections. *Id.* at 2914.

Similarly, the Georgia General Assembly has become a vastly more diverse legislature since the passage of the Voting Rights Act. In 1965, the Georgia Senate had 54 members, but only two were African-American. In 1973, although the state Senate had added two additional seats, there were still only two African-American members of the 56 members. *Id.* at 2930. By 2005, 11 of the 56 state Senators were African-American, and one state Senator was Latino. *Id.*

In 1963, the Georgia House of Representatives had 205 members but no African-American members. *Id.* In 1965, seven of the 205 members were African-Americans. *Id.* By 2005, the state House had shrunk in size to a total of 180 members. Of those 180, 39 were African-American and two were Latino. *Id.*

The vast number of African-Americans elected to all levels of office in Georgia shows that the Georgia of today is not the Georgia of 1964. In using the same formula to determine coverage, Georgia is unconstitutionally singled out for preclearance, based on behavior of individuals who, by and large, are long dead.

c. Georgia Demonstrated Dramatic Progress in White Voter Support for African-American Candidates

Not only have the policies of the state of Georgia and the face of its elected leadership changed dramatically since 1965, the behavior of Georgia voters has also changed. While many white Georgia voters in 1965 refused to support African-American candidates, they now offer strong support.

Nothing evidences that support more clearly than comparing the votes President Barack Obama received in Georgia with the votes received by the last two Democratic Presidential nominees, Senator John Kerry and former Vice President Al Gore. In the 2008 election, President Obama received 1,844,137 votes of the 3.9 million Presidential votes cast in Georgia. Those raw numbers mean that President Obama received 47% of the votes cast in a majority Republican state with only 29% black population. Georgia Secretary of State, *November 4, 2008 Official Election Results* (available at http://sos.georgia.gov/elections/election_results/2008_1104/001.htm).

In Georgia, President Obama received a percentage vote 3.8 points higher than former Vice President Gore in 2000, and 5.6 points higher than Senator Kerry in 2004. Congress' insistence that Georgia has "a continuing legacy of racism" in the context of the renewal of the VRA is nonsensical when an African-American candidate for President receives a greater percentage of the vote than his white predecessor candidates.

President Obama received a higher percentage of the vote in Georgia than in any other fully-covered state. Even a brief comparison of statistics demonstrates that white voters showed greater support for the President in Georgia than other fully-covered states. The state of Louisiana, which had a 31.9% black population[5] – higher than Georgia's – gave the President only 39.93% of the vote. Louisiana Secretary of State, *November 4, 2008 Official Election Results* (available at http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcms2&rqsdta=110408). Likewise, in Mississippi, with a 2007 black population of 37.1% – almost 10 percentage points higher than Georgia's – President Obama received only 43% of the vote. Mississippi Secretary of State, *November 4, 2008 Official Election Results* (available at http://www.sos. state.ms.us/elections/2008/08%20Certification%20Results/Cert/President%20&%20VP.pdf). The fact that more white

[5] The 2007 estimates are the most recent available from the U.S. Census Bureau through the 2005-2007 American Community Survey.

voters in Georgia cast votes for an African-American Presidential candidate than did other states is but one indication of the fallacy in Congress' assumption that all covered states are alike and therefore should all remain subject to the preclearance requirements of Section 5.

This trend seen in the votes cast for President Obama is not limited to the Presidential votes in Georgia. In the most recent statewide election (2006), Georgia's African-American Attorney General Thurbert Baker received more votes than any other Democrat, white or black, running statewide. Georgia Secretary of State, *November 7, 2006 Official Election Results* (available at http://sos.georgia.gov/elections/election_results/2006_1107/swfed.htm). Attorney General Baker also received more votes than Georgia's white Republican Secretary of State, Karen Handel and white Republican Lieutenant Governor, Casey Cagle. *Id.* Out of the ten partisan statewide state offices up for election in 2006, Attorney General Baker received the fourth highest number of votes of any successful candidate. *Id.*

Further, black candidates running statewide generally receive the same percentage of votes as white candidates. A perfect example was seen in the 2004 election when the Democratic Presidential nominee was white, the Democratic U.S. Senate nominee was black, the Democratic nominee for the state's Public Service Commission was white, and all were challenging incumbent Republicans. Georgia

Study at 2922. The votes cast were almost exactly even between the candidates:

Name	Office	Race	Percentage
Sen. John Kerry	President	W	41.4%
Denise Majette	U.S. Senate	B	40.0%
Mac Barber	PSC	W	39.5%

Id.

Unlike 1965, there is no pattern of discrimination against African-American candidates by Georgia's white voters. Congress' failure to address the changes from 1965 to today make the formula over-inclusive and unconstitutional.

2. The Over-Inclusive Coverage Requirements in the 2006 Renewal of Section 5 Are Not Saved by the Bailout Provision Because that Relief Is Not an Option for Many Covered Jurisdictions, Including Georgia

One of the ways Congress originally sought to address the problem of over-inclusivity in Section 5 was to add the bailout provision found in 42 U.S.C. § 1973b. *Boerne*, 521 U.S. at 533. However, in the 2006 renewal, the bailout procedures do not save the day. Those provisions do not reduce the "possibility of overbreadth," *id.*, because it is practically impossible for any jurisdiction to bail out of coverage.

The District Court, however, relied on the bailout provisions in an attempt to eliminate any complaint that the coverage formula for the 2006 renewal was unconstitutionally over-inclusive. According to the District Court, any jurisdiction which was improperly covered could bail out. *Mukasey*, 573 F.Supp.2d at 274.[6] As discussed below, however, the District Court's conclusion is flawed. The bailout provisions, also renewed without change,[7] do not save the statute.

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[6] The District Court cited the bailouts by several jurisdictions to attempt to prove its point. *Mukasey*, 573 F.Supp.2d at 233-34. While some counties in Virginia have successfully bailed out, they are the *only* jurisdictions to attempt bailout since the last renewal of Section 5 more than 25 years ago. Section 5 Covered Jurisdictions (available at http://www.usdoj.gov/crt/voting/sec_5/covered.php#note1). Moreover, because Virginia counties have no political subdivisions, the example is an apples to oranges comparison when considering the feasibility of bailout for covered states such as Georgia, with hundreds of covered subjurisdictions.

[7] During the renewal debate, Congress specifically turned back an attempt to expand the bailout provisions. 152 CONG. REC. H5206-07 (Daily Ed. July 13, 2006) (Recorded Vote on Westmoreland Amendment).

a. The Bailout Provisions Falsely Presume an Ability by the Covered Jurisdictions to Force Local Governments to Comply with Section 5 Even When, as Is the Case in Georgia, the Covered Jurisdiction Has No Control Over Local Governments

Georgia has nearly 900 governmental jurisdictions: 159 counties, 531 cities, and 183 school districts. In addition, Georgia has more than 570 "special districts" of one type or another. U.S. Census Bureau, 2007 Census of Governments. Unlike many states, no Georgia jurisdictions are under the control of any other entity. Each county functions independently from cities within its boundaries, each school board functions independently from county or city jurisdictions, and cities and special districts are not answerable to the counties in which they exist. GA. CONST. Art. IX, Sec. II; O.C.G.A. § 36-35-1 *et seq.*

This independent nature of each jurisdiction makes it even more challenging when a county or the state seeks to bail out from coverage. Even if a county had a perfect record of compliance since 1965, one failure by a city or school board within the boundaries of the county will prevent the county from bailing out for another ten years. Similarly, one mistake by a city with a very small population will prevent the entire State of Georgia from bailing out.

Georgia provides a perfect case in point. The last time the United States Attorney General lodged an

objection against the state of Georgia was in 1994.[8] The last time the state of Georgia was denied judicial preclearance was in 2001, during statewide redistricting; however, this Court overturned that refusal to grant judicial preclearance, *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Based on those objections and without liability for actions of political subdivisons, Georgia is at best eligible for bailout now or at worst less than two years away from being eligible.

However, once accountability for the actions of subjurisdictions is factored in, Georgia is still seven years away from even being able to think about bailing out because of the DOJ's questionable objection to the 2006 decision of a five-person voter registration board in Randolph County, Georgia (population 7,294). In that instance, the voter registration board issued a voter registration card to an elected official for the district in which he actually resided, following a redistricting of school board districts. In spite of this reality, the Department of Justice somehow determined that placing the voter in the correct district was a violation of Section 5 and objected to the change. Thus, using Section 5, the Department of Justice required Randolph County to allow the voter to maintain "residency" in a district different from the one where he actually lived so he could run for re-election to the school board in his old district. Letter from Randolph County Attorney

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[8] A 1996 objection by the Attorney General was withdrawn.

Tommy Coleman to Joseph D. Rich enclosing Preclearance Submission for Randolph County (July 13, 2006), located in DOJ File 2006-3856.

Thus, Georgia's first eligibility for bailout is now extended until at least 2016 based on the Department of Justice's questionable review and mandate regarding a decision made by a five-person voter registration board of a county that consists of 0.0782% of the entire population of Georgia. It is simply irrational for an entire county or the entire state to bear responsibility for the compliance of smaller jurisdictions over which they exercise absolutely no control.

b. Additionally, the Lack of Authority Over Local Governments Makes It Impossible for a Covered Jurisdiction Such as Georgia to Bail Out Because the State Cannot Verify that All Required Filings Have Been Made Over the Past 40 Years

When a jurisdiction of any size wants to bail out, it must undertake a review of ***every*** election law change made since 1965 to ensure that it is not currently enforcing any election law that has not been precleared, and then assert in the bailout litigation that ***every*** required filing for the currently enforced changes has been made. 42 U.S.C. § 1973b(a)(1)(D). That requirement is, for a covered state like Georgia, a logistical impossibility.

Most Georgia counties and cities employ part-time attorneys to handle legal affairs for the jurisdiction, including filing for Section 5 preclearance when necessary. Even if every political subdivision has always applied for and received preclearance when required (a doubtful proposition), there is no practical way to verify that fact. Even if the local jurisdictions were required to provide that information to the state, which they are not, no county or city attorney has the institutional knowledge to stretch back over 44 years and ensure that every single election change has been precleared. Unfortunately, the bailout provisions require the State, when seeking bailout, to certify just such complete compliance.

In short, Georgia can only bail out if, (a) in the past ten years, the United States Attorney General has not raised any Section 5 objections as to electoral changes made by the State or by any local jurisdictions which the State cannot and does not control and (b) Georgia can verify that each of its political subdivisions have requested and received preclearance for all electoral changes currently enforced. Georgia is required under the bailout provisions to collect information from all its various subjurisdictions that every single one of the tens of thousands of election laws, rules, and regulations in force over the last 44 years by over 1,400 governmental jurisdictions, including minor changes such as relocating a polling place from one public building to another within the geographical boundary of a voting precinct, to ensure that no rule currently being enforced had not been precleared. Even

assuming that the local jurisdictions have been in perfect compliance and can prove that fact (two very broad assumptions), they are not required to provide that information to the State.

For a State like Georgia, the bailout mechanism provides no relief from the over-inclusiveness of Section 5's renewal.

II. EVEN IF THE DISTRICT COURT CORRECTLY CHOSE TO APPLY THE RATIONAL BASIS TEST, THE PRECLEARANCE PROVISIONS OF SECTION 5 CANNOT BE CONSTITUTIONALLY APPLIED

As alleged by the Appellant, and as shown by the place Georgia finds itself, the preclearance provisions of Section 5 cannot be constitutionally applied, even using a rational basis test as the District Court did. Even before the election of President Obama, the undisputed facts outlined above show that Section 5 has served its purpose in covered jurisdictions such as Georgia. No longer is Georgia engaged in the gamesmanship Section 5 was designed to eliminate, i.e., covered jurisdictions trying to stay one step ahead of the federal government so as to perpetuate racial discrimination in the electoral process.

As noted above, Congressman John Lewis, one of the heroes of the civil rights movement, explicitly recognized the enormous changes in the South, which comprises the majority of the covered jurisdictions. In *Georgia v. Ashcroft*, Congressman Lewis offered

testimony that the percentages of minority voters in majority-minority districts could be reduced below 50% without any decrease in the ability of minority voters to elect candidates of choice. He testified, "We've come a great distance. I think in – it's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race." Georgia Study at 2918, *citing* Affidavit of John Lewis in *Georgia v. Ashcroft*, February 1, 2002, p. 18. Earlier in the same sworn statement, Congressman Lewis said, "So there has been a transformation, it's a different state, it's a different political climate, it's a different political environment. It's altogether a different world that we live, really." *Id.*, *citing* Affidavit of John Lewis in *Georgia v. Ashcroft*, February 1, 2002, p. 15-16.

Finally, while the results of the 2008 Presidential election obviously were not before Congress when it renewed the preclearance provisions of Section 5, those results support the contention that a Section 5 standard unchanged from more than 40 years ago cannot be said to be rational. The election of President Obama, and especially the President's voter performance in Section 5-covered jurisdictions, illustrates how far those jurisdictions have come from their history of discrimination.

More specifically, in light of the dramatic progress made, there is no rational basis upon which Congress could continue to subject certain jurisdictions to preclearance requirements based on 45-year-old data. Furthermore, with no realistic option for

"bailing out" for the next 25 years, states like Georgia have no mechanism to escape the overbreadth of the renewal.

CONCLUSION

Congress' remedial powers under the Fifteenth Amendment cannot extend to the point of ignoring reality. Because Section 5 of the Voting Rights Act as renewed cannot be constitutionally applied, the judgment of the District Court should be reversed and remanded for judgment to be entered in favor of Appellant.

Respectfully submitted,

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February 26, 2009

AMICUS CURIAE BRIEF

No. 08-322

In The Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., Attorney General of the United States of America, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICI CURIAE* JURISDICTIONS THAT HAVE BAILED OUT UNDER THE VOTING RIGHTS ACT IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST[1]

Amici curiae are several Virginia jurisdictions (hereafter "*Amici* Bailed Out Jurisdictions")[2] which over the last decade have bailed out from coverage under the special provisions of the Voting Rights Act. See 42 U.S.C. § 1973b. *Amici* Bailed Out Jurisdictions have a special interest in the bailout issues raised in this case and a unique perspective on these issues. Each jurisdiction has gone through the bailout process, has been found eligible to bailout by the United States Department of Justice and the DC courts, and each has in fact bailed out. *Amici* Bailed Out Jurisdictions believe that their views about the bailout

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[1] Counsel for the *Amici* here, J. Gerald Hebert, served as co-counsel to Travis County, Texas, in the district court. Travis County is a Defendant-Intervenor and Appellee in this case. Mr. Hebert withdrew as co-counsel for Travis County with the consent of the County, and advised the Clerk of this Court by letter dated January 22, 2009, that he had done so and would be filing a brief on behalf of certain *amici curiae* in this Court (supporting Appellees, including Travis County). A copy of the January 22 letter is appended as Exhibit A.

No counsel for a party authored any part of this brief. No person or entity other than *amici* or their counsel contributed monetarily to the preparation and submission of this brief. Correspondence from counsel of record for Appellees and Appellants consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] *Amici curiae* herein are the Registrars of Voters for the following local governments in Virginia, each of whom was responsible for pursuing the bailout in the political subdivision: Amherst, Essex, Middlesex, Page, Shenandoah, and Washington counties, and the City of Salem.

process and how it actually works will inform the Court in a way none of the existing parties is able.

SUMMARY OF ARGUMENT

Upon passage of the Voting Rights Act in 1965, each of the *Amici* Bailed Out Jurisdictions adapted to the Act's special provisions, particularly the preclearance procedures set forth in Section 5 of the Act, 42 U.S.C. § 1973c. They did so by incorporating the preclearance process into our routine procedures for implementing any change that affected voters. Over the course of the next three decades, *Amici* and the political subunits within our jurisdictions built the preclearance process into the adoption of all voting and election changes.

Except for *Amicus* Shenandoah County, which bailed out in 1999, all of the other *Amici* Bailed Out Jurisdictions have bailed out in the last three years. As detailed below, the process was not costly, administratively burdensome, or difficult. As for cost, our experience is that the total cost of obtaining a bailout was approximately $5000. That total cost included staff time gathering the relevant data and the filing of bailout documents in the DC court.

As for the bailout *process*, *Amici* found the process relatively easy and without any undue burden. Essentially *Amici* Bailed Out Jurisdictions gathered the necessary information and data supporting bailout from records we maintained in the ordinary

course of business. Our counsel then submitted that information to the United States Department of Justice, which then conducted its own independent review. We advertised the bailout in our community media and posted notices in post offices, as required by law. See 42 U.S.C. § 1973b. After we were notified by the Department of Justice that our jurisdiction had met the bailout requirements, our legal counsel filed suit and the necessary bailout papers in the DC Court.

Bailout is also achievable even if a County discovers during the bailout process that one or more of its political subunits is not in full compliance with the Voting Rights Act. During the course of the bailout process, for example, several of the *Amici* Bailed Out Jurisdictions discovered that some of their political subunits had inadvertently failed to submit certain, relatively minor voting changes for Section 5 review. In such cases, our bailout counsel promptly made a preclearance submission to the Department of Justice, preclearance was granted *nunc pro tunc*, and the bailout process was then completed.

In sum, contrary to claims made by Appellant and some of the *Amici* supporting Appellant, bailout is neither impossible, administratively burdensome, nor costly.

ARGUMENT

I. IMPLEMENTATION OF THE VOTING RIGHTS ACT IN VIRGINIA AND ITS SPECIAL PROVISIONS

The passage of the Voting Rights Act brought about major changes in the Virginia electorate. The Act immediately suspended Virginia's literacy test and eliminated the State's poll tax for federal elections. This Court's 1966 decision in *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966) invalidated the Virginia poll tax for state elections. As a result of these developments, there was throughout the Commonwealth a "major surge in black registration and voting . . . in the 1960's." Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990, p. 277 Chandler Davidson and Bernard Grofman, eds., 1994, Princeton University Press (hereafter "Quiet Revolution").

The passage of the Voting Rights Act in 1965, particularly the preclearance provisions of Section 5 of the Act, also had an immediate impact on the way local governments in Virginia such as ours conducted our business. Each of the *Amici* Bailed Out Jurisdictions had the sole responsibility to register voters for our local government (including the registration of voters for all political subunits within our borders). Each time *Amici* herein wanted to make a change in any voting standard, practice or procedure, we made a submission of such proposed change to the Department of Justice for preclearance. None of the *Amici*

here ever sought judicial preclearance from the DC court.

Amici Bailed Out Jurisdictions quickly adjusted to the Act's special provisions in one important way: we incorporated the preclearance process into our routine procedures for making any change that affected voters. Thus, it became standard operating procedure for voting officials in our jurisdictions to include the preclearance process in any timeline for implementing voting changes. It simply became routine practice for us to make a submission to the United States Attorney General whenever preclearance was required.

The preclearance submissions from political subdivisions such as *Amici* here were usually written by the County or City voting registrar, or some other election official in our County or City government offices, such as the City/County Electoral Board or the City/County Attorney. Our correspondence described the proposed voting change, provided whatever relevant statistical information we had which supported the preclearance request, and listed representatives of the minority community who could verify that they did not believe that the proposed changes were discriminatory. The preclearance process was straightforward, and not a single objection was ever interposed by the United States Attorney General to any voting changes made by any of the *Amici* Bailed Out Jurisdictions.

II. THE 1982 AMENDMENTS TO THE VOTING RIGHTS ACT AND THE IMPACT ON BAILOUT

When the Voting Rights Act was amended in 1982 to permit local governments like *Amici* here to bailout, the Congress rightly believed that "[a] substantial number of counties may be eligible to bail out when the new procedure goes into effect." S. Rep. No. 97-417 at 53. Indeed, one voting rights expert, "Mr. Armand Derfner[,] presented a chart compiled by the Joint Center for Political Studies. It showed a reasonable projection of 25 percent of the counties in the major covered states being eligible to file for bailout on the basis of their compliance with the objective criteria in the compromise bill." *Id.* And the Assistant Attorney General for the Civil Rights Division at the time, William Bradford Reynolds, testified to the same effect and his projected number of jurisdictions eligible to bailout in 1982 was "virtually identical to those in the Joint Center's estimate." *Id.*

Interestingly, following the amendments and extension of the Voting Rights Act in 1982 expanding the opportunity for bailout, not a single jurisdiction bailed out until 1997. In that year, the City of Fairfax, Virginia became the first jurisdiction to obtain a bailout pursuant to the criteria set forth in the 1982 amendments to the Voting Rights Act. Upon obtaining a bailout, the City of Fairfax explained through its counsel that it had sought a bailout because it was proud of its record of equal registration and voting opportunities, and a bailout gave the City a public

and official declaration that all aspects of the City's political process were equally open to all its citizens. See J. Gerald Hebert, City of Fairfax Obtains Voting Rights Act Bailout, National Cities Weekly, November 24, 1997, available at http://www.highbeam.com/DocPrint.aspx?DocId=1G1:20097806.

And even today, while no jurisdiction subject to the Voting Rights Act's special provisions has sought a bailout and been rejected, only 17 jurisdictions have sought a bailout. The attached chart (Exhibit B hereto) lists these 17 bailed out jurisdictions and the dates that each bailout was granted.

III. THE BAILOUT PROCESS IS NEITHER COSTLY, BURDENSOME, NOR TIME-CONSUMING

A. The Fact That Only 17 Jurisdictions Have Bailed Out Is Not An Indication That the Bailout Provisions Are Not Working

So if Congress and voting rights experts predicted in 1982 that roughly 25% of the covered jurisdictions were eligible to bailout, why have there been only 17 bailouts since that time? *Amici* offer several explanations.

"[M]any local officials are unaware of the bailout option."[3] As more and more jurisdictions become aware of the bailout opportunity, the number of jurisdictions bailing out should increase.

Indeed, within three years of the City of Fairfax's bailout in 1997, two additional jurisdictions (Frederick and Shenandoah counties, Virginia) bailed out. See Appendix at Exhibit B. In the last three years alone (2006-2008), seven jurisdictions have bailed out, so it would appear that more jurisdictions are becoming aware of the bailout opportunity. *Ibid.*

Appellant makes much of the fact that all of the bailouts have come from Virginia. See Appellants' Brief at 25. The reason, we believe, that bailouts have occurred only in Virginia is that it is very much a local issue for us. Once Fairfax opened the bailout door in 1997, word of bailout provisions started to slowly spread throughout our state, and other local governments interested in a bailout eventually followed suit. News of Fairfax's bailout and those bailouts that followed became a topic of conversation at meetings of Virginia's local government attorney association and annual meetings of Virginia local election officials. Counsel who has handled all the bailouts made presentations about the process at

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[3] "Bailout Under the Voting Rights Act", J. Gerald Hebert, in *America Votes!* (American Bar Association, 2008) (Benjamin E. Griffith, ed.) at 325 (hereafter "*America Votes!*").

these meetings.[4] The fact that bailouts have thus far been limited to Virginia has more to do with these particularized local factors than with any perceived uniqueness in our governmental structures.

Appellant has surmised, incorrectly, that the fact bailouts have occurred only in Virginia is due to the fact that there is something "idiosyncratic" or different about our local government structures that makes bailout easier for political subdivisions in our state than in other states. See Appellant's Brief at 25. This is incorrect.

Virginia's County governments are structured much like County governments in other states. They include other political subunits of government, such as towns, utility districts, and school boards. Some states, like Texas, may have counties that contain more political subdivisions than Virginia's counties do. But others, like Georgia, North Carolina, South Carolina, and Mississippi, are structured much the same as Virginia's counties. Thus, County governments in a number of the other covered states under the Voting Rights Act are in much the same position

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[4] Counsel for *Amici* Bailed Out Jurisdictions has represented all seventeen of the Virginia jurisdictions that have bailed out thus far. The fact that counsel has his law practice in Virginia and has made appearances at statewide conferences in Virginia where local election officials have been present (including County and City attorneys) is also an additional explanation of why bailouts have thus far been limited to Virginia.

as Virginia's counties when it comes to seeking and obtaining a bailout.

Virginia's cities, however, do differ from municipalities in other covered jurisdictions in one respect: cities are independent governmental entities separate from the counties they are located within. Accordingly, independent cities in Virginia run their own municipal affairs, including the maintenance of their own voter register rolls for City elections (County residents are not permitted to vote in City elections and vice versa). As a result, Virginia is the only covered state where cities may bailout, because they are separate political subdivisions which register voters.

Of the 17 bailouts in Virginia, however, only 4 have been by independent cities. See Exhibit B. Thus, Appellant's arguments that unique characteristics of Virginia local governments or its independent cities explain why Virginia-only jurisdictions have bailed out simply do not hold water.

In any event, the number of jurisdictions seeking bailout would likely increase if the Department of Justice were to make a concerted effort to disseminate information about bailout to covered jurisdictions. As counsel for *Amici* Bailed Out Jurisdictions explained to Congress in 2005, "If the DOJ were to include guidance about the bailout process and requirements with preclearance letters, where appropriate, to educate jurisdictions and make similar information clearly available under an appropriate

heading on its website for those jurisdictions unfamiliar with the bailout statute and rules, there would likely be an increase in the number of jurisdictions that seek bailout over the course of the next 25 years as compliance improves." An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing of the Senate Committee On The Judiciary, 109th Cong., 1st Sess. 177 (May 9, 2006) (Statement of Ted Shaw).

Furthermore, as explained below, the reasons that more jurisdictions have not exercised the bailout option is not attributable either to the cost involved or to the difficulty of the bailout process. To the contrary, the cost is affordable and the process of obtaining a bailout is relatively easy and straightforward for a jurisdiction that has operated in compliance with the Voting Rights Act.

B. A Bailout Is Financially Feasible

"Local officials may mistakenly believe that bailing out is not cost-effective or is administratively difficult." *America Votes!*, *supra*, at 326. Neither belief is well-founded.

As for costs, when voting officials within a jurisdiction seeking a bailout are willing to undertake the simple task of gathering the relevant data on their own rather than paying outside counsel to do so, "the legal fees for the entire process of obtaining a

bailout are less than $5000." The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Oversight Hearing of the House Committee On The Judiciary, Subcommittee On The Constitution, 109th Cong., 1st Sess. 90 (October 20, 2005) (Statement of J. Gerald Hebert). See also *America Votes!*, *supra*, at 326.

Furthermore, when a County or City bails out, all political subunits within the jurisdiction receive a bailout at that time. See 42 U.S.C. § 1973b. Thus, the one-time cost of a bailout for a County (or a Virginia City) and *all* its political subunits is affordable, even for relatively small jurisdictions like *Amici* Bailed Out Jurisdictions.

C. The Bailout Process Is Neither Cumbersome Nor Complicated

Nor is the *process* of obtaining a bailout administratively difficult or complicated. Once our jurisdictions decided to seek a bailout under the Voting Rights Act, we first assembled data and information from our files to determine if we met the bailout criteria that were set forth in the Voting Rights Act. We did so under guidance from counsel. Under the Act, gathering voting and election data will "assist the court in determining whether to issue a declaratory judgment under this subsection[.]" 42 U.S.C. § 1973b(a)(4).

The data and information we gathered included information that we maintain in the ordinary course of business, such as the number of voters in each voting precinct, the number of voters who turned out at the polls in past elections, and the number of minority persons who have worked at the voter registration office, electoral board, or served as poll officials. We also gathered past election results, particularly for those elections which involved a minority candidate. Finally, we assembled information on the various opportunities and methods persons in our communities can utilize to become registered voters. Often, such information about voter registration opportunities is set forth on our local government website and thus instantly accessible.

We also regularly maintain in our files correspondence we have sent to and received from the United States Department of Justice regarding Section 5 preclearance. These letters helped demonstrate that the *Amici* Bailed Out Jurisdictions complied in a timely fashion with the preclearance requirements under the Act.

The final data we collected to support our bailout request was information that tends to show that all persons within our jurisdictions enjoy an equal opportunity to participate effectively in the political process. To do this, we simply gathered: publicly available census data off the internet; described the method of election (*e.g.*, at-large, single-member districts) for our City or County, and the elective bodies within it; and identified the location and convenience of voter

registration sites and polling place locations for our voters.

Once we assembled this data, and it was not very time-consuming to do, we submitted the data to the Attorney General for review and verification. The Attorney General then undertook an independent investigation in our community to verify our bailout eligibility. We understand that local leaders in the minority community within our jurisdictions were interviewed by Justice Department personnel to obtain their views on our bailout request.

We also published Notice of our intention to bailout and posted the Notice in all appropriate post offices, as the bailout provisions require. See 42 U.S.C. § 1973b(a)(4) ("The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices."). In some of our jurisdictions, we held public hearings on the proposed bailout to give interested persons in our communities an opportunity to learn why we were seeking a bailout, to ask questions about the process, and to inform our voters of their opportunity to intervene in a bailout action if they so desired.

Upon the Department of Justice's determination that our political subdivisions were eligible to bailout, counsel for the *Amici* Bailed Out jurisdictions drafted the necessary court papers and submitted them to the

D.C. Court for approval. The entire bailout process for *Amici* Bailed Out Jurisdictions was smooth, transparent, and straightforward.

IV. JURISDICTIONS SEEKING BAILOUT CAN BRING POLITICAL SUBUNITS WITHIN THEIR BORDERS INTO COMPLIANCE WITH THE VOTING RIGHTS ACT DURING THE BAILOUT PROCESS

Appellant and *Amicus Curiae* Georgia Governor Sonny Perdue make the claim that an insurmountable hurdle to bailout is the fact that a State or a County lacks the power to force political subunits to comply with Section 5. See Appellant's Brief at 25-26. See Perdue Brief at 22-26. *Amicus Curiae* Georgia Governor Sonny Perdue further claims that "it is practically impossible for any jurisdiction to bail out of coverage." See Perdue *Amicus* Brief at 20-25. Neither of these claims is correct.

The argument that a State or a County is unable to obtain a bailout because it lacks the ability to bring non-compliant political subunits within their borders into compliance with Section 5 shows a fundamental lack of understanding of how the bailout process actually works. First, as the Department of Justice's Section 5 Guidelines make clear: "Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the submitting authority or by any other authorized person on behalf of the submitting authority. When one or more counties or

other political subunits within a State will be affected, the State may make a submission on their behalf." 28 C.F.R. § 51.23(a). So all a State or County has to do when faced with a Section 5 noncompliant political subunit is to "make a submission on their behalf." *Ibid.* Indeed, as explained below, this actually happened to several of the political subdivisions which have bailed out.

In *Amici* Bailed Out Jurisdictions' experience with the bailout process, we gathered data that we felt supported a bailout for our jurisdictions. We then notified the Department of Justice (DOJ) that we intended to seek a bailout and DOJ then conducted its own investigation to verify our bailout eligibility. Sometimes, in gathering data on our own and sometimes upon independent investigation by DOJ, *Amici* Bailed Out Jurisdictions discovered that a political subunit within our jurisdiction had failed to fully comply with the Voting Rights Act (*e.g.*, by making a timely preclearance submission of a voting change). In every instance when that happened, the political subunit was promptly brought into compliance with the Voting Rights Act by the County seeking a bailout. The County simply asked counsel to make a Section 5 preclearance submission on the political subunit's behalf, preclearance was obtained, and the bailout was completed. For example, in Shenandoah County, Virginia (one of the *Amici* here), which bailed

out in 1999,[5] the County discovered during the course of gathering information supporting the bailout that the County itself and a number of towns within the County had failed to submit voting changes for preclearance review. Specifically, the County had failed to submit one special election for preclearance review, and four towns within the County had failed to submit over 30 annexations for Section 5 review. But Shenandoah County encountered no difficulty in bringing the political subunits into compliance with Section 5 of the Voting Rights Act.[6] The County's legal counsel promptly submitted *all* of these changes for Section 5 review, and all were precleared by the Attorney General after his review showed no discriminatory purpose or effect. Thus, the County was able to use the bailout process to bring about compliance with Section 5 *nunc pro tunc*. Upon preclearance of these previously unsubmitted changes, and on the basis of other information supplied by Shenandoah County demonstrating compliance with the Voting Rights Act, the bailout process went forward and the Attorney General consented to the bailout judgment.

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[5] See *Shenandoah County, VA v. Reno*, No. 1:99CV00992 (D.D.C. October 15, 1999) (consent judgment and decree).

[6] The Stipulation of Facts that was signed by the parties and filed in *Shenandoah County, VA v. Reno, supra*, details these previously unsubmitted changes and how they were precleared during the bailout process. See *Shenandoah County, VA v. Reno*, No. 1:99CV00992 (D.D.C. October 15, 1999) (Stipulation of Facts at ¶23).

This type of flexible approach by the United States Attorney General is exactly what was envisioned by the bailout provisions. As the legislative history to the 1982 amendments explained: "This safeguard will permit evidence to be presented of voting rights infringements which have not previously been the subject of a judicial determination. However, such violations would not bar bailout if 'the plaintiff establishes that any such violation were trivial, were promptly corrected, and were not repeated.'"[7]

Similarly, two other jurisdictions that have bailed out, Roanoke and Warren counties, Virginia, had a total of 13 previously unsubmitted and unprecleared changes at the time they initiated bailout proceedings. In both instances, the unsubmitted changes (some of which had been undertaken by political subunits) were submitted for preclearance by the County, and following preclearance, the bailout process was successful. See J. Gerald Hebert, An Assessment of the Bailout Provisions of the Voting Rights Act, in Voting Rights Act Reauthorization of 2006, at 277 (Appendix A) (Henderson ed., 2007).

That Shenandoah, Roanoke and Warren counties all were permitted to bailout despite the existence of previously-implemented, but unsubmitted changes (including many changes by political subunits thereof)

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[7] S. Rep. No. 97-417, at 53, *reprinted in* 1982 U.S.C.C.A.N. at 231.

shows that the current bailout provisions are both flexible and workable for covered jurisdictions. While Congress made clear that a political subdivision cannot bailout if it has violated "any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color" in the past ten years, it also permitted political subdivisions who registered voters to pursue bailout in limited circumstances even where minor voting rights infractions existed and those trivial issues could be quickly resolved, as they were in these three Virginia counties.[8]

Thus, *Amici* Bailed Out Jurisdiction's own real world experience shows that a jurisdiction that inadvertently failed to submit voting changes for preclearance but implemented the changes anyway (such as happened in Shenandoah and Warren counties) were not barred from obtaining a bailout even though implementation of the unprecleared changes constituted technical violations of the preclearance provisions of the Voting Rights Act. Such "violations" were deemed inadvertent and fell into the "trivial" category.

Moreover, it is not the case that bailout is "practically impossible[.]" Perdue *Amicus* Brief at 20. Our own bailouts prove that local governments like ours that register voters and conduct elections can establish

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[8] 42 U.S.C. § 1973b(a)(3) (2005).

full compliance with the Voting Rights Act over at least a ten-year period. And *Amici* here are unaware of anything that would not permit a substantial number of counties in Georgia (or any other State subject to the special provisions of the Voting Rights Act for that matter) from seeking a bailout today and making such a showing.

It is true that in some political subdivisions, bailout will not be possible because a proposed voting change submitted for preclearance has drawn an objection by the Attorney General or was rejected by the District of Columbia court. But that is as it should be. After all, if an objection has been interposed or a declaratory judgment denied under Section 5, it is because the submitting authority failed to show that its submitted change was not free of a racially discriminatory purpose or effect. See 42 U.S.C. § 1973c. And that is precisely the prophylactic impact that Congress intended Section 5 to have, and it is one that this Court has consistently noted and upheld: "[Section 5] must, of course, be interpreted in light of its prophylactic purpose and the historical experience which it reflects." *McDaniel v. Sanchez*, 452 U.S. 130, 151 (1981). See also *McCain v. Lybrand*, 465 U.S. 236, 246 (1984), and *City of Rome, Georgia v. United States*, 446 U.S. 156, 202 (1980).

CONCLUSION

For the foregoing reasons, the judgment of the three-judge court of the United States District Court for the District of Columbia should be affirmed.

Dated: March 2009

Respectfully submitted,

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EXHIBIT A

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January 22, 2009

The Honorable William K. Suter
Clerk of the Court
Supreme Court of the United States
Washington, DC 20543

Re: No. 08-322, *NW Austin Municipal Utility District No. 1 v. Mukasey*

Dear Mr. Suter:

The Court noted probable jurisdiction in this appeal on January 9, 2009.

I serve as co-counsel for Travis County, Texas, one of the appellees in the above-referenced appeal. In that capacity, my co-counsel (Mr. Renea Hicks) and I were co-signatories to a motion to affirm submitted on behalf of numerous appellees-intervenors on November 26, 2008 I also served with Mr. Hicks as co-counsel to Travis County in the district court.

I am writing to advise the Court that I am withdrawing as counsel for Travis County in this appeal. Travis County has consented to the withdrawal. It is my intention to file a brief in this case on behalf of certain *amici curiae* who will be aligned with Travis

County. Travis County will continue to be represented in this Court by Mr. Hicks. In any *amici curiae* brief that I file in this appeal, I will include a footnote referencing my prior representation of Travis County.

Thank you for your attention to this matter.

Sincerely,

/s/ J. Gerald Hebert
J. Gerald Hebert

cc counsel of record

EXHIBIT B

Jurisdictions That Have Bailed Out Since 1982
Extension and Amendments to the Voting Rights Act

Jurisdictions (All In Virginia)	**Bailout Granted Date**
Fairfax City	October 21, 1997
Frederick County	September 9, 1999
Shenandoah County	October 15, 1999
Roanoke County	January 24, 2001
Winchester City	May 31, 2001
Harrisonburg City	April 17, 2002
Rockingham County	May 21, 2002
Warren County	November 25, 2002
Greene County	January 19, 2004
Augusta County	November 30, 2005
Salem City	July 27, 2006
Botetourt County	August 28, 2006
Essex County	January 31, 2007
Page County	September 15, 2008
Washington County	September 23, 2008
Middlesex County	January 4, 2008
Amherst County	August 13, 2008

AMICUS CURIAE BRIEF

No. 08-322

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR.,
Attorney General of the United States, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF NICHOLAS DEB. KATZENBACH, DREW S. DAYS, III, JOHN R. DUNNE, BRIAN K. LANDSBERG, BILL LANN LEE, J. STANLEY POTTINGER, AND JAMES P. TURNER AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici are former Attorney General of the United States Nicholas deB. Katzenbach and former officials in the Civil Rights Division of the United States Department of Justice. Collectively, they have served during both Democratic and Republican administrations. They have substantial experience with the Department's implementation of the preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *Amici* believe that their collective experience will illuminate the issues before the Court. *Amici* write this brief principally to respond to the brief filed on behalf of Abigail Thernstrom and five former Justice Department officials ("Thernstrom *Amici*"). That brief urges this Court to strike down the reauthorized Section 5 on the ground that it authorizes or demands unconstitutional race-based districting. The Thernstrom *Amici*'s argument relies principally on the ground that the United States Department of Justice, which administers the statute, is purportedly a serial violator of the Constitution with a "proven track record of using [its] power to require at least presumptively unconstitutional racial districting." Thernstrom Br. 34.

But that supposed "track record" involves a handful of cases during a brief period immediately following the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

1990 census—*i.e.*, nearly two decades ago—when this Court's precedents, exemplified by *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), appeared to permit the use of race in drawing electoral districts so long as the district lines did not dilute the votes of any group, and when this Court was not even applying strict scrutiny to "benign racial classification[s]" adopted by the federal government, *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 563 (1990). Since this Court made clear in *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*), and *Miller v. Johnson*, 515 U.S. 900 (1995), that districting decisions trigger strict scrutiny when race is the "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," *id.* at 916—and since this Court made clear in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), that all racial classifications, state and federal, trigger strict scrutiny—the Department of Justice has assiduously complied with those principles. *See* Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412, 5412-13 (Jan. 18, 2001). *Amici* who served in the Department after this Court's decisions in *Shaw I*, *Miller*, and *Adarand* were responsible for ensuring that the Department complied with those decisions. Their experience contradicts the assertions in the Thernstrom brief. A list of *amici* follows.

Nicholas deB. Katzenbach. Nicholas deB. Katzenbach served as the Deputy Attorney General from 1962-1965 and as the Attorney General of the United States from 1965-1966, during which time he helped draft the Voting Rights Act of 1965 and he argued the constitutionality of the Voting Rights Act

before this Court in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). He was Under Secretary of State from 1966-1969. Prior to that time, he was a law professor for eight years and then served as Assistant Attorney General of the Office of Legal Counsel. Since his government service, Katzenbach has served as General Counsel of the IBM Corporation and as Chairman of the Board of Directors of the MCI Corporation.

Drew S. Days, III. Drew S. Days, III, served as Assistant Attorney General for Civil Rights from 1977-1981 and as Solicitor General of the United States from 1993-1996. Prior to his service in the Civil Rights Division, he was an attorney for the NAACP Legal Defense and Education Fund. Since his government service, Days has been the Alfred M. Rankin Professor of Law at the Yale Law School.

John R. Dunne. John R. Dunne served as Assistant Attorney General for Civil Rights from 1990-1993. Prior to that time, he served over 20 years in the New York State Senate. Since his government service, Dunne has been an attorney in private practice.

Brian K. Landsberg. Brian K. Landsberg was an attorney in the Civil Rights Division from 1964-1986, where he served as Chief of the Appellate Section from 1974-1986. In 1993, he returned to the Division to serve as Acting Deputy Assistant Attorney General for Civil Rights. Since his government service, Landsberg has been a professor at the McGeorge School of Law at the University of the Pacific. He is the author of two books on the Division's civil rights enforcement: Enforcing Civil Rights - Race Discrimination and the Department of

Justice (Univ. Press of Kan. 1997) and Free at Last to Vote: Alabama and the Origins of the Voting Rights Act (Univ. Press of Kan. 2007).

Bill Lann Lee. Bill Lann Lee served as Assistant Attorney General for Civil Rights from 1997-2001. Prior to that time, he was an attorney for the NAACP Legal Defense and Education Fund for 18 years. Since his government service, Lee has been an attorney in private practice; he chaired the bipartisan National Commission on the Voting Rights Act.

J. Stanley Pottinger. J. Stanley Pottinger served as Assistant Attorney General for Civil Rights from 1973-1977. Prior to that time, from 1970-1973, he served as Director of the Office of Civil Rights at the Department of Health, Education, and Welfare. Since his government service, Pottinger has been a lawyer in private practice, an investment banker, and an author.

James P. Turner. James P. Turner was an attorney in the Civil Rights Division from 1965-1994. He served as Deputy Assistant Attorney General for Civil Rights from 1969-1994, and as Acting Assistant Attorney General for Civil Rights from 1993-1994.

SUMMARY OF ARGUMENT

The arguments raised by the Thernstrom *Amici* are not properly before this Court. The Thernstrom *Amici* essentially concede that Section 5 of the Voting Rights Act, as amended in 2006, *is* valid prophylactic legislation as applied to voting changes other than redistricting; their argument relates exclusively to the statute's application to claims of vote dilution in redistricting. But there is no redistricting issue in this case—nor could there be, as Appellant does not elect its board members from districts. Moreover, the Appellants have never challenged the amendments Congress made to the preclearance standard—whether in the district court, in their Jurisdictional Statement, or in their opening brief on the merits—and the district court did not address any such challenge. Indeed, the Thernstrom *Amici* make clear that what they seek is an advisory opinion regarding the constitutionality of amended Section 5 as it might be applied in the future to circumstances different from those at issue here. The Court accordingly should not reach the challenges asserted for the first time by the Thernstrom *Amici*.

In any event, the amendments to the preclearance standard are constitutional. The amendment to the purpose prong of Section 5 requires denial of preclearance to voting changes with "any discriminatory purpose." 42 U.S.C. § 1973c(c). To be sure, that provision sweeps more broadly than did Section 5's purpose prong as interpreted prior to 2006—which, per this Court's decision in *Reno v. Bossier Parish School Board*, 528 U.S. 320, 328 (2000) (*Bossier II*), required denial of preclearance only when a change was

motivated by a *retrogressive* purpose. But it sweeps no more broadly than does the Constitution itself. The amendment to the purpose provision merely incorporates the standard this Court has adopted to determine whether discrimination violates the Fourteenth and Fifteenth Amendments. *See Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 67 (1980) (plurality opinion); *Washington v. Davis*, 426 U.S. 229, 240 (1976).

The Thernstrom *Amici* cannot point to anything in the amended purpose standard that in any way purports to "require race-based districting that subordinates traditional districting principles." Thernstrom Br. 26. Rather, in arguing that the amended Section 5 triggers strict scrutiny and is unconstitutional, they simply assert that the Department of Justice will apply that provision—in violation of its plain text and of this Court's decisions in *Shaw I*, *supra*, and *Miller*, *supra*—to require such districting. Their assertion rests on nearly two-decade-old allegations that "[d]uring the 1990 redistricting cycle" the Department found discriminatory purpose and denied preclearance—in a handful of cases involving statewide redistricting—when states "fail[ed] to maximize the number of majority-minority districts." Thernstrom Br. 18. But those allegations involve conduct that occurred before *Shaw I* and *Miller*—and before this Court made clear that strict scrutiny applies to all federally imposed racial classifications. There is no evidence that the Department has disregarded *Shaw I* and *Miller* in its administration of the preclearance process in the years since this Court decided those cases. Indeed, the Department issued guidance that specifically

acknowledges that its preclearance decisions must take account of, and be constrained by, the principles adopted in those cases. *See* Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412, 5412-13 (Jan. 18, 2001). To conclude, from allegations of conduct in the 1990 redistricting cycle, that a facially constitutional statute should be invalidated based on the presumption that the Department will *apply* that statute unconstitutionally, would fundamentally deny the respect this Court owes to coordinate branches of government.

Nor are the Thernstrom *Amici* correct to say that the amended Section 5 *effects* standard "locks in all existing majority-minority districts until 2031" and does so "regardless of intervening demographic or other changes." Thernstrom Br. 26, 28. Both this Court and the Department of Justice have long recognized that demographic and constitutional constraints may require a voting change to be precleared *even if it is retrogressive*. *See City of Richmond v. United States*, 422 U.S. 358, 370-72 (1975); Guidance Concerning Redistricting, *supra*, at 5412-13; Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 488 (Jan. 6, 1987) (codified at 28 CFR § 51.54). Although the 2006 amendments changed the standard for determining what is retrogressive, it made absolutely no change to the settled principle that even a retrogressive plan must be precleared if the alternative is a constitutional violation. Thus, the amended Section 5 will never require maintenance of majority-minority districts that violate *Shaw I* and *Miller*. The Thernstrom *Amici* are simply

wrong to suggest that the amended effects test bars all reductions in minority voting-age population in the districts covered by Section 5.

ARGUMENT

I. The Constitutionality Of The Amendments To Section 5's Preclearance Standard Is Not Properly Before The Court

The Thernstrom *Amici*'s constitutional challenge to the amendments to Section 5's preclearance standard is not properly before this Court. Appellant did not present this argument below, in its Jurisdictional Statement, or in its opening brief before this Court. Throughout these proceedings, Appellant has challenged Congress's decision to *extend* Section 5 for another 25 years without permitting jurisdictions like it to bail out; the extension, Appellant has argued, lacks congruence and proportionality under *City of Boerne v. Flores*, 521 U.S. 507 (1997). But Appellant has not challenged the *changes* Congress made to the preclearance standard, and the district court issued no ruling on such a challenge. In these circumstances, the Thernstrom *Amici*'s challenge must be disregarded. *See, e.g., Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001) (declining to address issue that was raised only by *amici* and not raised or decided below); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below.").

Even if the Thernstrom *Amici*'s challenge had been properly raised, it would not be appropriate for this Court to reach it. The duty to decide whether Congress, a coordinate branch of government, has acted within its powers in enacting legislation is "the gravest and most delicate duty that this Court is called upon to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring). Accordingly, this Court cannot invalidate an Act of Congress on its face so long as *any* "set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see Tennessee v. Lane*, 541 U.S. 509, 530-31 (2004) (holding that, having determined that Title II of the Americans with Disabilities Act is a valid exercise of Congress's Fourteenth Amendment enforcement power as applied to the context before the Court, the Court "need go no further"—even if some applications of that statute would exceed Congress's power). This rule is an application of the basic principle that Article III of the United States Constitution gives federal courts authority to review the constitutionality of an Act of Congress "only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

The Thernstrom *Amici*'s challenge to Section 5's amended preclearance standard focuses entirely on the application of those amendments to redistricting plans. There is, however, no redistricting plan at issue in this case, and for good reason—Appellant does not even elect its board members from districts. As a result, Appellant

would lack standing to challenge Section 5's possible application to redistricting. Appellant faces no "actual and imminent," as opposed to "conjectural or hypothetical," injury that is fairly traceable to the application of Section 5 to redistricting. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009). Section 5, of course, extends to a "wide range" of voting changes *other* than redistricting. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 502 (1992).[2] Those changes include changes to "the manner of voting," such as the moving or consolidation of polling places; changes to "candidacy requirements and qualifications"; and changes "affecting the creation or abolition of an elective office." *Id.* at 502-03. The Thernstrom *Amici* acknowledge that, as applied to those non-redistricting sorts of voting changes, the amended Section 5 "*is* simply a prophylactic prohibition against devices that exclude access to the ballot, and does not coerce racial favoritism or proportionality." Thernstrom Br. 10 (emphasis in original). Under this Court's precedents, that concession is sufficient to defeat the Thernstrom *Amici*'s facial challenge, even if a justiciable

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[2] In fact, of the approximately 4,000 to 6,000 Section 5 submissions received by the Justice Department each year, "[r]edistricting plans are only a small portion of those submissions." *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 9, Serial No. 109-79, Vol. I (2005) (statement of Bradley J. Schlozman, then-Acting Assistant Attorney General of the Civil Rights Division, United States Department of Justice). During the two years immediately following a decennial census, redistrictings constitute less than 20% of the total number of preclearance requests, and that number drops below 10% in the other eight years of the decade. *See id.* at 9-10.

facial challenge were properly before this Court. *See Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (stating that all members of the Court "agree that a facial challenge must fail where the statute has a plainly legitimate sweep") (internal quotation marks omitted).

Indeed, in the last two pages of their brief, the Thernstrom *Amici* state—with admirable candor—that what they seek from this Court is nothing more or less than an advisory opinion regarding whether the amended Section 5 is constitutional insofar as it might be applied in the future to different parties and facts than those presented in this case. Thernstrom Br. 36-37 ("[W]e emphasize that receiving the Court's guidance now on § 5's constitutionality in the redistricting context is extremely important" as "[r]edistricting will begin in 2011."). But "the judicial power to decide cases and controversies does not include the provision of purely advisory opinions to the Executive." *Clinton v. Jones*, 520 U.S. 681, 700 (1997).

II. The Amendments To Section 5's Preclearance Standard Are Constitutional

Even if they were properly before this Court, the Thernstrom *Amici*'s constitutional challenges to the amendments to Section 5 would be unavailing. Section 5 has always provided that preclearance should be withheld if a proposed voting change is discriminatory in purpose or effect. The 2006 amendments to the Voting Rights Act made changes to both the purpose and effect

prongs of the statute. Contrary to the contentions of the Thernstrom *Amici*, those changes are constitutional.

A. By Requiring Denial of Preclearance to Changes with "Any Discriminatory Purpose," Congress Merely Incorporated This Court's Own Standard for Unconstitutional Discrimination

In *Bossier II*, this Court held that "the 'purpose' prong of § 5 covers only retrogressive dilution." 528 U.S. at 328. Thus, even if a proposed voting change reflected purposeful discrimination on the basis of race—and thus violated the Constitution—*Bossier II* required preclearance of that change so long as the purpose was not to make things *worse* than they had been in the past. *See id.* at 336 (requiring preclearance of "a plan that is *not* retrogressive—*no matter how unconstitutional it may be*"). In the 2006 amendments to the statute, Congress overturned that ruling. Section 5 now provides that "any discriminatory purpose" behind a voting change—not just a retrogressive purpose—warrants a denial of preclearance. 42 U.S.C. § 1973c(c).[3] Because the amended purpose provision simply incorporates this Court's own standard for unconstitutional discrimination, *see Washington v. Davis*, 426 U.S. 229 (1976), it is valid legislation to enforce the Fourteenth

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[3] By contrast, Congress left intact this Court's holding in *Reno v. Bossier Parish School Board*, 520 U.S. 471, 485 (1997) (*Bossier I*) that a violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, cannot alone provide a basis for denying preclearance under Section 5.

and Fifteenth Amendments. *See United States v. Georgia*, 546 U.S. 151, 158 (2006) (stating that "no one doubts that" Congress may provide remedies for actual constitutional violations).[4]

The Thernstrom *Amici* argue that Congress's decision to incorporate the *Washington v. Davis* standard somehow triggers strict scrutiny and threatens constitutional principles. They assert that the amendment to the purpose provision of Section 5 "authorize[s] the Department [of Justice] to use its 'discriminatory purpose' power to again require race-based districting that subordinates traditional districting principles." Thernstrom Br. 26. That assertion is curious, because the Constitution *itself* prohibits states from diluting minority voting strength with a discriminatory purpose. *See Rogers*, 458 U.S. at 617; *City of Mobile*, 446 U.S. at 67.

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[4] This Court's decision in *Bossier II* rested on principles of statutory interpretation. *See* 528 U.S. at 329-36 (emphasizing that a retrogressive effect had already been held to be necessary to violate Section 5's effects prohibition, and that, because the words "purpose" and "effect" were textually parallel terms in that section, a retrogressive purpose must be necessary to violate the section's purpose prohibition). Because purposeful discrimination violates the Constitution, it cannot violate the Constitution for Congress to prohibit that conduct, and shifting the burden of proof to jurisdictions with a significant history of discrimination is appropriate in light of Congress's "wide berth in devising appropriate remedial and preventative measures for unconstitutional actions." *Lane*, 541 U.S. at 520; *see City of Rome v. United States*, 446 U.S. 156, 181-82 (1980) (Section 5's burden shift is appropriate response to history of discrimination by covered jurisdictions).

The Thernstrom *Amici* repeatedly disparage the prohibition on purposeful discrimination. They call it a "free-floating purpose inquiry" (Thernstrom Br. 34), and frequently render the word "purpose" in quotation marks (*id.* at 3, 15, 17). They also complain about the supposed complexity of the discriminatory purpose inquiry; they urge, for example, that it requires a "subjective, open-ended assessment of the submitting jurisdiction's 'purpose'" (*id.* at 16-17), and a "speculative and amorphous analysis of whether the alternative was rejected "'because of,' not merely 'in spite of,'" its 'dilutive' effect" (*id.* at 15-16 (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979))). But as their citation to *Feeney* suggests—as does their citation, in the next sentence, to *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977)—this sort of discriminatory purpose analysis is the *standard analysis* this Court applies in all Fourteenth and Fifteenth Amendment discrimination cases.

In criticizing that analysis as "extraordinarily open-ended and amorphous in the redistricting context" (Thernstrom Br. 16), the Thernstrom *Amici* disregard the experience of the Department of Justice, which has found the *Arlington Heights* analysis fully administrable in the Section 5 context. *See Voting Rights Act: Section 5—Preclearance Standards, Hearing Before the Subcomm. on the Constitution of the H. Judiciary Comm.*, 109th Cong. 8, Serial No. 109-69 (2005) (testimony of Mark A. Posner, former Special Counsel for Section 5, United States Department of Justice). More important, they ignore this Court's cases, which make clear that the discriminatory purpose requirement

"applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination." *City of Mobile*, 446 U.S. at 67; *see also Rogers*, 458 U.S. at 617 (holding that the *Washington v. Davis/Arlington Heights* standard governs constitutional vote dilution cases). Indeed, *Washington v. Davis* itself held that the purposeful discrimination requirement applies across the board in Fourteenth Amendment race cases—and it explicitly invoked a *redistricting* case, *Wright v. Rockefeller*, 376 U.S. 52 (1964), as an example of the point. *Davis*, 426 U.S. at 240 (citing *Wright*).

Because the amended purpose provision merely incorporates the very standard that this Court has applied to determine whether the Fourteenth and Fifteenth Amendments have been violated, the Thernstrom *Amici* are simply wrong to say that the amended provision "contains an 'implicit command that States engage in presumptively unconstitutional race-based districting.'" Thernstrom Br. 2 (quoting *Miller*, 515 U.S. at 927). Contrary to the Thernstrom *Amici*'s assertion, the amended purpose provision does *not* authorize the Department of Justice "to find discriminatory purpose whenever a covered jurisdiction has failed to create a race-based district, even where the district is plainly at odds with traditional districting principles" (Thernstrom Br. 18), or to "use its 'discriminatory purpose' to again require race-based districting that subordinates traditional districting principles" (*id.* at 26). And it certainly does not permit the Department "to force Georgia to create a third majority-[minority] district that ignores standard districting principles" (*id.*) or to deny preclearance if it determines that "*improvements* to minority voting

strength" are "not sufficiently far-reaching to maximize minority voting strength" (*id.* at 33-34). As this Court underscored, a state does not engage in unconstitutional intentional discrimination simply by failing to maximize minority voting strength or following traditional districting principles. *See Miller*, 515 U.S. at 924 (holding that a "policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan 'so discriminates on the basis of race or color as to violate the Constitution'" (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976))).[5]

Not surprisingly, the Thernstrom *Amici* can point to nothing in the amended purpose requirement of Section 5 that purports to authorize the Department of Justice to "require race-based districting that subordinates traditional districting principles." Thernstrom Br. 26. Instead, their argument relies almost entirely on allegations that "*[d]uring the 1990 redistricting cycle*, the Department routinely denied

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[5] The Thernstrom *Amici* assert that there is not "any judicial review" of the Attorney General's decision to deny preclearance. Thernstrom Br. 18. That assertion is misleading at best. Although the Attorney General's decision to *grant* preclearance is final and nonreviewable, *see Morris v. Gressette*, 432 U.S. 491 (1977), when the Attorney General *denies* preclearance the submitting jurisdiction is entitled, by the very terms of Section 5, to a *de novo* trial of the issue before a three-judge district court, with direct review to this Court. *See* 42 U.S.C. § 1973c(a). As the many judicial preclearance cases that have reached this Court demonstrate, that process is certainly a "practical" means of obtaining judicial review. *Cf.* Thernstrom Br. 17-18 n.3 (internal quotation marks omitted).

preclearance to redistricting plans" based on discriminatory purpose where those plans "fail[ed] to maximize the number of majority-minority districts." Thernstrom Br. 18 (emphasis added). These allegations involve a handful of statewide redistrictings that took place three presidential administrations and nearly two decades ago. And far from a "routine" practice, there are only two instances in which this Court concluded that the Department required "maximization": the Georgia redistricting, *Miller*, 515 U.S. at 917, 925-26, and the North Carolina redistricting, *Shaw v. Hunt*, 517 U.S. 899, 913 (1996) (*Shaw II*), both of which followed the 1990 census. In general, "[t]he Department utilized the well-established framework for conducting discriminatory purpose analyses set forth by the Supreme Court in the Arlington Heights case." *Voting Rights Act: Section 5—Preclearance Standards*, *supra*, at 14.

In any event, the Georgia and North Carolina objections that were the subject of *Miller* and *Shaw II* occurred at a time when the state of constitutional law was very different than it is today. When covered jurisdictions were drawing redistricting plans and submitting them for preclearance during the 1990 redistricting cycle, this Court had not yet ruled that the Constitution could be violated by race-based line drawing that did not deny or dilute any individual's or group's vote. That ruling did not come until 1993, in *Shaw I*, 509 U.S. at 649-50, and the contours of *Shaw I*'s constitutional prohibition on "racial gerrymandering" were not clear until 1995, when this Court decided *Miller*, 515 U.S. at 915-17, 920-23. Nor had the Court ruled, by the time of the 1990 redistricting

cycle, that racial classifications adopted by the federal government receive the same strict scrutiny as those adopted by the states. That ruling did not come until 1995, when this Court decided *Adarand*, 515 U.S. at 226-27; *cf. Metro Broad.*, 497 U.S. at 563 (applying only intermediate scrutiny to "benign racial classification[s]" adopted by the federal government).

When the Department of Justice was reviewing preclearance submissions during the 1990 redistricting cycle, the then-existing precedent most relevant to the issues the Court would later address in *Shaw I* and *Miller* was *United Jewish Organizations*, *supra*. This Court's decision in *United Jewish Organizations* was, to be sure, "highly fractured." *Shaw I*, 509 U.S. at 651. But it provided substantial support for the proposition that, in the absence of vote dilution, "racial gerrymandering" did not violate the Constitution. *See id.* at 658-59 (White, J., joined by Blackmun and Stevens, JJ., dissenting) (noting that a majority of justices "held that plaintiffs were not entitled to relief under the Constitution's Equal Protection Clause" because "members of the white majority could not plausibly argue that their influence over the political process had been unfairly canceled or that such had been the State's intent" (citations omitted)). Indeed, in *Shaw I* itself, four justices dissented on the ground that *United Jewish Organizations* foreclosed the cause of action for nondilutive "racial gerrymandering" that the Court adopted there. *See id.* at 658-59 (White, J., joined by Blackmun and Stevens, JJ., dissenting); *id.* at 684 (Souter, J., dissenting). *Miller*, too, was decided over the dissent of four justices. *See Miller*, 515 U.S. at 934 (Ginsburg, J., joined by Stevens and Breyer, JJ., and

by Souter, J., in part, dissenting). The failure of Department of Justice officials, in 1990, "to predict the future course of constitutional law," *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (internal quotation marks omitted), does not justify invalidating a congressional enactment today based on the presumption that the Department will disregard this Court's decisions in the future.

The Thernstrom *Amici* have not offered a shred of evidence that, since *Shaw I* and *Miller*, the Department of Justice has refused to preclear a redistricting plan unless it subordinated traditional districting principles in an effort to maximize minority voting strength. Indeed, after *Shaw I* and *Miller*, the Department issued guidance that specifically recognized that the principles adopted in those cases are among the constraints that may require preclearance of a retrogressive change. *See* Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412, 5412-13 (Jan. 18, 2001). If, in the future, the Department disregards the rules of constitutional law this Court settled in *Shaw I* and *Miller*, a covered jurisdiction can bypass the Department entirely and seek preclearance in the District Court for the District of Columbia. *See* 42 U.S.C. § 1973c(a). And a private party could always file a lawsuit under *Shaw I* and *Miller* themselves. But to *presume* that the United States Department of Justice will apply the purpose prong of Section 5 unconstitutionally, and to invalidate the statute itself based on that presumption, would fail to accord the proper respect to coordinate branches of government. As this Court has explained:

> A possibility always exists, of course, that the legitimate objectives of any law or legislative

> program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional.

Tilton v. Richardson, 403 U.S. 672, 679 (1971). Because the amended purpose provision of Section 5 does nothing more than incorporate the standard that this Court has itself adopted to assess unconstitutional discrimination under the Fourteenth Amendment, that provision is a valid exercise of Congress's power to enforce that Amendment. The Court may not apply strict scrutiny and invalidate that provision based on the presumption—a presumption at odds with published Department guidance—that the Department of Justice will disregard this Court's *Shaw I* and *Miller* jurisprudence and refuse to enforce the provision according to its terms.

B. The Amended Retrogression Standard Does Not Demand Violations of *Shaw I* and *Miller*

In addition to the changes to Section 5's purpose standard, the 2006 amendments to the Voting Rights Act also changed its effects standard. *See* 42 U.S.C. § 1973c(b), (d).[5] The Thernstrom *Amici* assert that the

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[5] Congress amended Section 5's effects standard to measure retrogression by determining whether the change at issue will diminish minority citizens' ability "to elect their preferred candidates of choice," rather than whether it will diminish minority citizens' influence in the political or electoral process. 42 U.S.C. § 1973c(b); *see id.* § 1973c(d) ("[t]he purpose

(Cont'd)

amended effects test triggers strict scrutiny and violates the Constitution because it has a "nakedly racial purpose" (Thernstrom Br. 32); that it "locks in all existing majority-minority districts until 2031," and does so "regardless of intervening demographic or other changes" (*id.* at 26, 28); and that it therefore operates as a "quota ceiling on nonminorities' ability to elect" (*id.* at 27). These assertions rest on a fundamental misunderstanding of the amended effects prohibition.

Since the enactment of the Voting Rights Act in 1965, Section 5 has prohibited voting changes with a discriminatory effect. In its authoritative decision in *Beer*, this Court read the effects provision of Section 5 as requiring "that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. at 141. On

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of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice"). Subsection (b) states:

> Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

Id. § 1973c(b).

its face, the original Section 5 effects provision contained "no defense or justification" (*cf.* Thernstrom Br. 27) that would permit a voting change that diminished minority voting strength. But this Court recognized that Section 5 could not be understood as imposing an utterly inflexible prohibition on retrogression. Thus, in *City of Richmond v. United States*, 422 U.S. 358 (1975), the Court held that an annexation that reduced the black population percentage in Richmond, Virginia, from 52 percent to 42 percent did not violate Section 5's effects prohibition. *See id.* at 370-72. It was enough, this Court held, that the city's election plan "fairly reflect[ed] the strength of the Negro community as it exist[ed] *after* the annexation." *Id.* at 371 (emphasis added).

In a similar vein, the Department of Justice has long refused to "read *Beer* to require the reflexive imposition of objections in total disregard of the circumstances involved or the legitimate justifications in support of changes that incidentally may be less favorable to minority voters." Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 488 (Jan. 6, 1987). In particular, the Department has recognized that retrogression can be justified where a plan that maintains preexisting minority voting strength would violate the Constitution: "[I]n the redistricting context, there may be instances occasioned by demographic changes in which reductions of minority percentages in single-member districts are unavoidable, even though 'retrogressive,' i.e., districts where compliance with the one person, one vote standard necessitates the reduction of minority voting strength." *Id.* Since this Court made clear, in *Shaw I* and *Miller*, that the Constitution prohibits nondilutive

racial gerrymandering, the Department has recognized that a retrogressive redistricting plan must nonetheless be precleared if the only alternative is a plan that violates the principles articulated in those cases. *See* Guidance Concerning Redistricting, *supra*, at 5413 ("[P]reventing retrogression under Section 5 does not require jurisdictions to violate *Shaw v. Reno* and related cases."); Letter from Bill Lann Lee, Acting Assistant Attorney General, to John C. Henry, Esq., 3 (May 20, 1998) (stating that "a reduction in minority voting strength that is required by the United States Constitution does not violate Section 5" and specifically recognizing that a *Shaw* violation may warrant "some reduction in minority voting strength").[7] And even where retrogression was not justified, it was settled law that "[n]onretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished." *Bush v. Vera*, 517 U.S. 952, 983 (1996) (opinion of O'Connor, J.).

The 2006 amendments to Section 5's effects provision *made absolutely no change* to these principles. In amending the effects provision, Congress merely addressed a very specific controversy over the *definition* of retrogression—a controversy that is relevant only in the context of *some* redistricting plans. In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), this Court considered whether a Georgia state senate redistricting plan was retrogressive. That plan reduced the black

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[7] *Available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_052008.php

voting-age population in three previously majority-minority districts to "just over 50%," which made it at least "marginally less likely that minority voters [could] elect a candidate of their choice in those districts." *Id.* at 486. But, at the same time, the plan increased the black voting-age population percentage in four other districts where blacks remained a voting-age *minority*. *See id.* at 487. The Court held that the district court should not have denied preclearance to the plan simply on the basis of the reduction in minority voting-age population in the three majority-minority districts; it directed the district court to consider, on remand, whether the addition of more non-majority "influence" or "coalitional" districts rendered the new plan, considered as a whole, nonretrogressive. *Id.* The Court explained that it would not necessarily be retrogressive for a state to trade existing districts in which minority voters had the opportunity to elect candidates of their choice for "'influence districts'—where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Id.* at 482. The Court concluded that "[t]he State may choose, consistent with § 5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters." *Id.* at 483.

It is on this narrow point that Congress took issue with this Court's retrogression jurisprudence. The amended Section 5, overturning *Georgia v. Ashcroft*, deems it retrogressive when a state trades away existing districts in which minority voters have the

opportunity to elect candidates of choice in order to create more districts in which minority voters have some undefined "influence" in the political or electoral process. Now, retrogression must be measured solely by whether the voting change will diminish minority citizens' ability "to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b), (d). Congress thus agreed with the *Georgia v. Ashcroft* dissenters that "redefin[ing] effective voting power in § 5 analysis without the anchoring reference to electing a candidate of choice" leaves the nonretrogression principle "substantially diminished" and "practically unadministrable." *Georgia v. Ashcroft*, 539 U.S. at 493-94 (Souter, J., dissenting).[8] But the amendment to the effects provision did not change the principle that demographic or constitutional constraints may justify even a retrogressive redistricting plan under Section 5.

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[8] The Thernstrom *Amici* assert (at 33) that the amendment to the effects provision reflects Congress's "outrage[]" at "the notion of Georgia being allowed to take some baby steps away from super-majority black districts." That is not a fair reading of the record. As the House committee report shows, Congress was not moved by outrage at what transpired on the ground in the State of Georgia, but by disagreement with the *Georgia* Court's conclusion that a state may diminish the ability of minority voters to elect the candidates of their choice and leave them to a difficult to define notion of "influence." *See* H.R. REP. No. 109-478, at 69 (2006) ("Under its 'new' analysis, the Supreme Court would allow the minority community's own choice of preferred candidates to be trumped by political deals struck by State legislators purporting to give 'influence' to the minority community while removing that community's ability to elect candidates."); *id.* at 70 ("[T]he Committee is concerned by testimony indicating that '[m]inority influence is nothing more than a guise for diluting minority voting strength.'") (footnote omitted).

As this description should make clear, the amendment to the effects provision does not "lock[] in all existing majority-minority districts until 2031." Thernstrom Br. 28; *accord id.* at 4, 26.[9] What it presumptively locks in—subject to the same defenses that applied before the 2006 amendments—is minority voters' ability to elect the candidates of their choice. As racially polarized voting diminishes, minorities in those districts may be able to maintain the same ability to elect the candidates of their choice with smaller percentages of the population. *See Bartlett v. Strickland*, No. 07-689, 2009 WL 578634, at *16 (U.S. Mar. 9, 2009) (opinion of Kennedy, J.).[10]

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[9] The Thernstrom *Amici* assert that the "existing majority-minority districts . . . raise serious Fourteenth Amendment concerns." Thernstrom Br. 28. But there is no constitutional concern with a majority-minority district *per se*. *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 253 (2001). Such districts raise constitutional concerns only when race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," and the legislature "subordinate[s] traditional race-neutral districting principles . . . to racial considerations." *Miller*, 515 U.S. at 916. Indeed, where a majority-minority district is consistent with traditional districting principles (as when minorities make up a majority of the population of a sizeable city), it is the *failure* to draw such a district that will raise constitutional concerns. *Cf. League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) (dividing Laredo, with its cohesive Latino community, bore "the mark of intentional discrimination").

[10] The Thernstrom *Amici* are therefore incorrect to state that the amended effects provision "*increases* federal race-conscious mandates in *inverse* proportion to the race-consciousness of the electorate." Thernstrom Br. 31-32. As we explain in text, as racially polarized voting decreases, the constraints the effects provision imposes on the states will necessarily loosen.

The amended effects prohibition therefore is not insensitive to "changes in voting patterns." *Cf.* Thernstrom Br. 4. Indeed, it is only the continuing *existence* of racially polarized voting that can make districting the sort of racial zero-sum game the Thernstrom *Amici* posit (Thernstrom Br. 11);[11] absent racially polarized voting, the maintenance of minorities' ability to elect the candidates of their choice can impose no "ceiling on nonminorities' ability to elect." *Cf.* Thernstrom Br. 27.

Nor does the amended effects provision set forth an "inviolable" prohibition that requires maintenance of minority voting strength "regardless of changes in . . . demographics," (*cf.* Thernstrom Br. 4), or regardless of any inquiry into "feasibility" or any other "defense or justification" (*cf. id.* at 27). It is true that the amended Section 5, like the original Section 5, does not contain any *express* defenses for retrogressive changes. But both this Court and the Department of Justice have recognized that demographic and constitutional constraints may appropriately justify a voting change that is retrogressive. *See* pp. 21-23, *supra*. The amendments to Section 5 changed the definition of retrogression, but they did not purport to alter the

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[11] *See, e.g., Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 4-5, Serial No. 109-75 (2005) (testimony of Laughlin McDonald); *id.* at 49-79 (testimony of Prof. Richard Engstrom); *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 301-02, Serial No. 109-103 (2006) (Appendix to the Statements of the Hon. Bill Lann Lee and the Hon. Joe Rogers).

principle that demographic or constitutional constraints may require preclearance even of some retrogressive changes. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (citations omitted)). Accordingly, the amended effects provision would still require preclearance of a retrogressive redistricting plan where demographic changes made retrogression "unavoidable," Revision of Procedures, *supra*, at 488; *cf. City of Richmond*, 422 U.S. at 371 ("It is true that the black community, if there is racial bloc voting, will command fewer seats on the city council; and the annexation will have effected a decline in the Negroes' relative influence in the city. But a different city council and an enlarged city are involved after the annexation."), or where avoiding retrogression would require violating *Shaw I* and *Miller*, *see* Guidance Concerning Redistricting, *supra*, at 5413.

Nor is there anything problematic about Congress's prohibition of changes that "diminish[]" the opportunity to elect candidates of choice, 42 U.S.C. § 1973c(b). *Cf.* Thernstrom Br. 26. Diminishment of minority voting strength is what retrogression has always meant, and it is hardly novel to use "diminish" and "retrogress" as synonyms in this context. *See Bush v. Vera*, 517 U.S. at 983 (opinion of O'Connor, J.) ("Nonretrogression . . . mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." (emphasis omitted)). To the extent that the Thernstrom *Amici* mean to suggest that the amended effects provision would bar any reduction in the minority voting-age

population percentage in a district, the foregoing discussion should demonstrate that the provision will do no such thing. It is diminishment in the opportunity to elect, not in district demographics, that the amended provision defines as retrogressive. In many cases, a reduction in minority voting-age population percentage will not diminish the opportunity to elect candidates of choice.[12]

Finally, the decision to frame the effects test in terms of non-diminishment rather than in terms of "racial *equality*" (Thernstrom Br. 28) was not an innovation of the 2006 amendments to the Voting Rights Act. To the contrary, it is an essential part of the retrogression standard that has governed discriminatory effects analysis under Section 5 at least since *Beer*, *supra*. The Court has upheld Section 5, with its nonretrogression standard, because it applies to those areas of the country where a deep history of discrimination raises especial concern that a *diminution* of minority voting strength will be an *unequal* diminution. *See Lopez v. Monterey County*, 525 U.S. 266, 282-84 (1999); *City of Rome*, 446 U.S. at 181-82; *South Carolina v. Katzenbach*, 383 U.S. 301, 330-331 (1966); *see also* Brief for Intervenor-Appellees Texas State Conference of NAACP Branches, Austin Branch of the NAACP, and Nathaniel Lesane at 22-49. That analysis applies equally to the post-2006 effects language. Accordingly, this Court should neither apply strict scrutiny nor invalidate the amended effects test.

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[12] *See Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 74-76 (D.D.C. 2002) (noting that "Section 5 is not an absolute mandate for maintenance of [majority-minority] districts" and that in certain circumstances "dilution of minority voting age population may have no retrogressive effect"), *vacated on other grounds by* 539 U.S. 461 (2003).

CONCLUSION

This Court should not reach the constitutional questions raised for the first time in the Thernstrom *Amici* brief. Should the Court reach those questions, however, it should reject the Thernstrom *Amici*'s arguments and affirm the judgment of the district court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-322

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

On Appeal from the
United States District Court for the
District of Columbia

BRIEF OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS AND THE LCCR EDUCATION FUND *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*

The Leadership Conference on Civil Rights ("LCCR") is a coalition of 200 organizations committed to the protection of civil and human rights in the United States.[1] It is the nation's oldest, largest, and most diverse civil and human rights coalition. LCCR was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph, of the Brotherhood of Sleeping Car Porters; Roy Wilkins, of the NAACP; and Arnold Aronson, of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races and ethnicities.[2]

LCCR promotes effective civil rights legislation and policy. It was in the vanguard of the movement to secure passage of the Civil Rights Acts of 1957, 1960 and 1964, the Voting Rights Act of 1965 and the Fair Housing Act of 1968. Since enactment of these landmark laws, the number of LCCR member organizations has grown, and LCCR's commitment to social justice has flourished.

The LCCR Education Fund ("LCCREF") is the research, education, and communications arm of LCCR. It focuses on documenting discrimination in American society, monitoring efforts to enforce civil rights legislation, and fostering better public under-

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[1] The parties have consented to the filing of this brief in letters on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] See Appendix A for a list of LCCR member organizations.

standing of issues of prejudice. LCCREF has published studies and reports on many subjects, including voting rights.

One of LCCR's and LCCREF's core roles is promoting voting rights, especially among racial and ethnic minorities. Beginning with the Voting Rights Act of 1965, LCCR has been instrumental in the passage of voting rights reform, including the reauthorization of the Voting Rights Act in 2006. For this latter initiative, LCCREF launched Renew the VRA, a national grassroots education campaign about the need for strong and vigorous voting rights protection. Part of this campaign included issuing a series of reports on fourteen states, which assessed the impact of the temporary provisions of the Voting Rights Act on each state over the previous 25 years. These reports showed that those provisions played a significant role in protecting minority voting rights but found that discrimination still pervades the electoral process. The work of the Renew the VRA campaign and LCCR's coordination of the national legislative effort played a significant role in Congress's decision to renew § 5 of the Voting Rights Act for another 25 years.

LCCR and LCCREF have filed only a handful of *amicus curiae* briefs before this Court. We do so only when we believe that a vital national interest is at stake. That is the case here. That national interest is the right of all citizens in the United States to vote without facing discrimination, to choose leaders that represent their interests and, by doing so, to promote the influence of the United States throughout the world as a viable and vibrant democracy.

Several other organizations that are not members of LCCR also join as signatories to this brief. These organizations and their Statements of Interest are set forth in Appendix B.

POSITION OF *AMICI CURIAE*

LCCR, LCCREF and the other supporting *amici* believe Congress's decision in 2006 to extend § 5 of the Voting Rights Act for 25 years was a reasonable and appropriate exercise of Congress's enforcement authority under the Fourteenth and Fifteenth Amendments. While the United States has made substantial progress toward eliminating racial discrimination in voting since 1965, the problems that initially prompted Congress to adopt § 5 have not been solved. Just this month, a plurality of this Court recognized that "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett* v. *Strickland*, No. 07-689, slip op. at 21 (Mar. 9, 2009) (Opinion of Kennedy, J.).

In extending § 5, Congress carefully surveyed the modern-day voting rights landscape and concluded that racial and language discrimination in voting persist in the United States and that the problem is particularly severe in the jurisdictions covered by § 5. Consequently, it concluded that special procedures are still warranted in these regions to preserve and continue the progress of the last four decades. This Court should not take the extraordinary step of second-guessing the national legislature's judgment, given the fundamental nature of the right at issue, the careful deliberation that Congress gave to the

matter, and the specific factual findings on which Congress's judgment rests.

Amici agree with the District Court and the appellees that the constitutionality of the 2006 extension should be assessed under the deferential standard applied in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and subsequent § 5 cases. The Court's subsequent analysis in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), does not purport to alter or displace the *Katzenbach* analysis, nor does it mandate a heightened review standard in this case. Given the specific authority granted to Congress under the Fourteenth and Fifteenth Amendments and the fundamental nature of the right to vote, Congressional enactments to protect minority voting rights are entitled to the highest level of deference from this Court. The Court has always applied the *Katzenbach* framework in considering the constitutionality of § 5 and other Voting Rights Act provisions, and should not depart from that consistent practice in this case.

Amici also agree with the District Court and the appellees that under either the *Katzenbach* or the *City of Boerne* standard, the 2006 extension of § 5 is an appropriate exercise of Congress's powers to prevent and redress voting discrimination. We write separately to emphasize that the progress the United States has made toward eradicating racial discrimination in voting since 1965, though real and substantial, is nonetheless fragile and unfinished. Without the continued protection of § 5, there is a significant risk that these gains will erode or even disappear over time.

The consequences that could ensue if this Court were to invalidate § 5 are severe. Over the years,

many jurisdictions have adopted voting changes that were never precleared and therefore could not be implemented. If § 5 were invalidated, these existing changes would become enforceable. And additional changes would certainly follow. In the next round of redistricting, many existing majority-minority districts could be eliminated. Some currently covered jurisdictions, if not bound by § 5, might restructure their governments in ways that disadvantage minority voters, *e.g.*, by switching from a system of single-member districts to at-large voting, reducing the number of seats on elected bodies, or reallocating authority from one body to another. Jurisdictions may also discriminate against minority voters by implementing new direct barriers to the right to vote, *e.g.*, by purging voters from the registration rolls, by eliminating polling places or reducing voting hours, or by simply cancelling elections altogether. In short, without the protection of § 5, many of the gains of the last four decades could be lost. As we show below, the clock of progress has been turned back before in American history. This Court must not let it happen again.

SUMMARY OF ARGUMENT

The premise of appellant's argument is that the circumstances that justified enactment of § 5 in 1965 were peculiar to that time and have since essentially disappeared. To be sure, as Congress specifically found, there have been extraordinary advances in minority political participation since 1965—advances

that are due in no small part to the effectiveness of § 5 in preventing discriminatory electoral practices.[3]

But as the *Bartlett* plurality recognized, racial discrimination and racially polarized voting are very much alive today. This is hardly surprising. The attitudes and prejudices that gave rise to the widespread and systematic discrimination that existed in 1965 were shaped over centuries. Some 88 years elapsed between the Compromise of 1877, which marked the end of Reconstruction, and the enactment of the Voting Rights Act in 1965. In 2006, the protections of the Act had been in place for only 41 years—less than half that time. In light of the deep historical roots of the problem and the extensive evidence of ongoing discrimination that Congress reviewed, it was reasonable for Congress to conclude that another 25 years was needed to eradicate the legacy of discrimination in the jurisdictions covered by § 5.[4]

We make three key points below. First, history teaches that gains in minority political participation are fragile and must be vigilantly protected by both the political branches of government and by the

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[3] *See* Pub. L. No. 109-246, 120 Stat. 577, § 2(b)(1) ("Significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965.").

[4] *See* H.R. Rep. No. 109-478, at 58 (2006) (finding that "another 25 years of remedial measures (for a total of 67 years of remedial measures under the VRA until 2032) remains appropriate given the near century of discrimination the Act is designed to combat").

courts. In the decade following the Civil War, there were substantial gains in African American voter registration and political participation. But those gains were quickly erased following the end of Reconstruction. While there were numerous causes of this reversal, historians agree that a pair of decisions by this Court—*United States* v. *Reese*, 92 U.S. 214 (1876), and *United States* v. *Cruikshank*, 92 U.S. 542 (1876)—played a significant role. These decisions struck down key provisions of the Enforcement Act of 1870, 16 Stat. 140, which Congress had enacted to protect African American voting rights, and construed other provisions so narrowly that they were of little practical effect. With no effective federal statutory scheme in place to protect minority voting rights, States and local jurisdictions were free to implement a wide range of discriminatory laws and practices that effectively nullified the Fifteenth Amendment's guarantees for many generations. In light of this history, the present-day Court should be extremely hesitant to question Congress's judgment that the protections of § 5 are still necessary.

Second, Congress's determination that § 5 is still needed to preserve and extend the progress of the last four decades is reasonable and supported by the legislative record. Appellant does not dispute the underlying facts, but instead challenges the conclusions that Congress drew from those facts. But even if the Court might have weighed the evidence differently or drawn different conclusions if it were considering the matter in the first instance, it still should defer to Congress's judgment because "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 199 (1997). Viewing

Congress's findings in the appropriate deferential light, there is ample evidence to support the conclusion that the special protections of § 5 are still necessary in the covered jurisdictions.

Finally, appellant argues that § 5 is no longer necessary because there are other legal tools for combating racial discrimination in voting—most notably § 2 of the Voting Rights Act, 42 U.S.C. 1973. But while § 2 is valuable and necessary, it is not an adequate substitute for § 5. The two provisions serve different purposes. Section 2 is designed to remedy existing discrimination, while § 5 is designed to prevent discrimination from occurring in the first place. In enacting § 5, Congress drew on extensive experience showing that case-by-case litigation is not a sufficient safeguard against discriminatory voting practices. The problems with the case-by-case approach that existed in 1965 continue to exist today. Individual litigation under § 2 is time-consuming and expensive. Most minority voters simply do not have the resources to bring such actions. And without § 5, it would be relatively easy for defendant jurisdictions to circumvent court orders in § 2 cases by adopting new discriminatory practices. There is a real risk that if § 5 were not in place, many jurisdictions could revert to discriminatory practices, significantly undermining the progress that the United States has made over the last four decades toward achieving political equality for all its citizens.

ARGUMENT

I. History Shows That Gains in Minority Political Participation Can Be Reversed If the Political Branches and the Courts Fail To Vigilantly Protect Them.

The Court has frequently observed that "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).[5] With that adage in mind, *amici* believe it is instructive to consider the history of Congress's first efforts to protect minority voting rights in the post-Civil War period, the role that this Court played in invalidating those laws, and the consequences that ensued.

The gains in minority political participation that have been made in the United States since 1965 have been great. But there were also significant advances in minority voter registration and political participation in the South in the decade following the Civil War. These gains resulted from an aggressive federal effort to secure and protect African Americans' right to vote. By 1868, more than 700,000 African Americans had been registered to vote under the supervision of federal troops.[6] As a result, somewhere between 75% to 95% of eligible African American men were registered to vote in the South during the early years of Reconstruction.[7]

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[5] *Cf.* 1 GEORGE SANTAYANA, THE LIFE OF REASON: OR THE PHASES OF HUMAN PROGRESS 284 (1917) ("Those who cannot remember the past are condemned to repeat it.").

[6] BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 5 (1992).

[7] RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 33 (2004).

The Fifteenth Amendment was ratified in 1870. Shortly afterward, Congress enacted the Enforcement Act of 1870, 16 Stat. 140, which among other things prohibited discrimination in voter registration and prescribed criminal penalties for obstructing voting rights. The Act was further amended in 1871 to permit federal courts to appoint election supervisors to oversee federal elections and voting registration. Act of Feb. 28, 1871, ch. 99, 16 Stat. 433.

The combination of large numbers of African-American voters and the adoption of new legal mechanisms to protect their rights had a remarkable impact on minority political participation. In the early 1870s, substantial numbers of African Americans were elected to political office at all levels of government. By the end of Reconstruction, eighteen African Americans had served in southern states in such statewide offices as lieutenant governor, treasurer, superintendent of education or secretary of state, and by 1875 there were eight African Americans serving in Congress, representing six different states.[8] More than 600 African Americans also served in state legislatures—the large majority of them former slaves.[9] African Americans made up nearly half of the lower-house delegates in Mississippi and Louisiana and were a majority in South Carolina, which also had an African American justice on its Supreme Court.[10] In the words of Professor

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[8] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 353, 538 (1988).

[9] *Id.* at 355.

[10] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 29 (2004).

Eric Foner, a leading historian of the Reconstruction period, this represented "a stunning departure in American politics."[11] And "[a]n equally remarkable transformation occurred at the local level, where the decisions of public officials directly affected daily life and the distribution of power."[12] According to Professor Foner, "[i]n virtually every county with a sizable black population, blacks served in at least some local office during Reconstruction."[13]

These gains proved short-lived. Reconstruction came to an end in 1877, following a compromise between Democrats and Republicans that resolved the disputed presidential election of 1876. Southern jurisdictions then began implementing a wide variety of measures to nullify African American voting rights. Many of the early measures involved racial gerrymandering techniques designed to dilute African American voting strength.[14] In the 1890s, state

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[11] FONER, *supra*, at 355.

[12] *Id.*

[13] *Id.* at 356.

[14] *See id.* at 590–91:

> "Throughout the South, . . . districts were gerrymandered to reduce Republican voting strength. Mississippi Redeemers concentrated the bulk of the black population in a 'shoestring' Congressional district running the length of the Mississippi River, leaving five others with white majorities. Alabama parceled out portions of its black belt into six separate districts to dilute the black vote. Cities from Richmond to Montgomery redrew ward lines to ensure Democratic control. Wilmington's black wards, containing four fifths of the city's population, elected only one third of its aldermen. Georgia severely restricted black voting by a cumulative poll tax requirement, a measure adopted at the behest of Robert Toombs, who professed his willingness 'to

efforts to disenfranchise African American voters became more brazen. Beginning with Mississippi in 1890, several southern states rewrote their constitutions and enacted laws adopting literacy tests, poll taxes, "good character" requirements, white primaries and other similar measures intended to exclude African Americans from the electorate.[15] As a result, the gains in minority political participation from Reconstruction were quickly erased.[16]

The reasons for this reversal are complex. But historians generally agree that this Court's 1876 decisions in *Reese* and *Cruikshank*, which struck down key provisions of the 1870 Enforcement Act and rendered others effectively unenforceable, played a significant role. In *Reese*, voting inspectors in Kentucky were indicted under §§ 3 and 4 of the Enforcement Act for wrongfully refusing to accept the vote of an African American citizen on account of his race and color. *See* 92 U.S. at 238–39 (Hunt, J., dissenting).

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face thirty years of war to get rid of negro suffrage in the South."

[15] *See* GROFMAN ET AL., *supra*, at 8–9.

[16] For example, in the 1880 presidential election, African American turnout in the South ranged from a low of 42% in Georgia to a high of 84% in Florida. VALELLY, *supra*, at 128. By the 1900 election, turnout had been reduced to the single digits in five southern states, and was well on its way to virtual extinction throughout the region. *Id.* By the mid-1890s, the number of African Americans in the Mississippi legislature had been reduced to zero (down from 64 in 1873), and just one African American legislator remained in South Carolina. KLARMAN, *supra*, at 32. Similarly, local office-holding by African Americans all but disappeared. *Id.*; *see also* VALELLY, *supra*, at 52 (number of African American legislators in the South fell by nearly 80% between the end of Reconstruction and 1890).

The Court affirmed the dismissal of the indictment, holding (on a strained reading of the statute) that §§ 3 and 4 were unconstitutional because they were not limited to wrongful discrimination on account of race. *Id.* at 218–20.

In *Cruikshank*, decided the same day as *Reese*, the Court reversed the convictions of three Louisiana men under § 6 of the 1870 Enforcement Act for conspiracy to deny African Americans a variety of civil rights, including the right to vote. This case arose out of a disputed election that escalated into an armed conflict—the notorious "Colfax Massacre" of 1873—in which whites seeking to expel African American and Republican officeholders stormed a courthouse in Grant Parish, Louisiana, killing more than 100 African Americans who had gathered to defend the courthouse.[17] In reversing the convictions, the Court concluded that many of the rights referred to in the indictment—including the right of peaceable assembly, the right to bear arms, and the rights of life and personal liberty—were not granted or protected by the federal Constitution. 92 U.S. at 551–54. With respect to the convictions for hindering African Americans in the exercise of their voting rights, the Court concluded that the indictment had not adequately alleged a racial motive: "We may suspect that race was the cause of the hostility; but it is not so averred." *Id.* at 556.

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[17] *See generally* FONER, *supra*, at 437. For more detailed accounts of the Colfax Massacre and its aftermath, *see* CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008); LEANNA KEITH, THE COLFAX MASSACRE (2008).

Legal scholars may continue to debate whether *Reese* and *Cruikshank* were correctly decided. But historians have long agreed that these decisions effectively gutted the federal statutory scheme for the protection of African American voting rights. In his history of this Court, Charles Warren observed that:

> "The practical effect of these decisions was to leave the Federal statutes almost wholly ineffective to protect the negro, in view of the construction of the Amendments adopted by the Court, the lack of adequate legislation in the Southern States, and the extremely limited number of rights which the Court deemed inherent in a citizen of the United States, *as such*, under the Constitution."[18]

Professor Foner describes the *Cruikshank* decision as "devastating," noting that it "rendered national prosecution of crimes committed against blacks virtually impossible, and gave a green light to acts of terror where local officials either could not or would not enforce the law."[19] Professor William Gillette likewise notes that the *Reese* case "made future enforcement [of voting rights] vastly more difficult, and in some cases clearly impossible."[20] And a recently published history notes that the two decisions "limited the likelihood of intervention to prevent systematic abuses," and that "[i]n combination with the withdrawal of troops . . . this bar to oversight em-

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[18] 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 604 (1926).

[19] FONER, *supra*, at 530–31.

[20] WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 1869–1879, at 295 (1979).

powered mass intimidations and manipulations at the polls."[21] In short, the Court's failure to protect African American voting rights played a significant role in the retrenchment that followed the end of Reconstruction.

The advances in minority political participation in the United States over the last four decades are undoubtedly more solid and substantial than the gains that were made in the post-Civil War era. But the history of the post-Reconstruction period should serve as a warning that the clock of progress can be turned back if the political and judicial branches of government fail to exercise sufficient vigilance. The comments of another prominent historian, Professor C. Vann Woodward, at the hearings on the 1982 extension of the Voting Rights Act are pertinent in this regard. Asked why the history of Reconstruction is relevant, Professor Woodward replied:

> "[I]t makes evident and clear that revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward; that enormous gains can be lost and jeopardized, eroded, or diluted, and abridged in spite of the enormous cost that those advances have made.
>
> "The first reconstruction cost us our greatest bloodshed and tragedy. It would seem that if anything has been paid for at a higher price, it was these advances. And yet, they were eroded and lost, and only a century later they were restored.

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[21] KEITH, *supra*, at 158.

> "My history teaches me that if it can happen once, it can happen again."[22]

Given the lessons of history, Congress was properly unwilling in 2006 to allow § 5 to lapse. This Court should be equally reluctant to second-guess Congress's judgment that the protections afforded by § 5 are still necessary in the present day.

II. Congress's Determination That the Special Protections of § 5 Are Still Necessary in Covered Jurisdictions Is Reasonable and Entitled to the Highest Level of Deference.

In extending § 5, Congress recognized that the United States had made significant progress toward achieving political equality for minority voters in the 41 years since the Voting Rights Act was enacted.[23] Congress also found, however, that racial discrimination and racially polarized voting continued to exist and that these problems were most severe in the jurisdictions covered by § 5. Based on its review of the evidence, Congress concluded that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment

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[22] *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong. 2027 (1981).

[23] *See* Pub. L. No. 109-246, § 2(b)(1) ("Significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965.").

and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution." Pub. L. No. 109-246, § 2(b)(7). It further found that without continuation of § 5, minority voters "will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." *Id.* § 2(b)(9).

Appellant does not and cannot dispute that § 5 was a constitutional exercise of Congress's power in 1965. Instead, appellant simply questions Congress's assessment of the extent of voting discrimination in covered jurisdictions as of 2006. Moreover, appellant does not dispute the underlying facts relied on by Congress, but merely contends that Congress drew the wrong conclusions from the facts before it. Appellant views the record as showing that voting discrimination "persists in haphazard and uncoordinated instances in covered and uncovered jurisdictions alike" (App. Br. at 43) and asks the Court to adopt that view.

But appellant's argument misapprehends the relationship between Congress and the Court. This Court should not conduct a *de novo* review of the evidence considered by Congress. Nor should it substitute its own judgment about the extent of voting discrimination or the need for continued protections in covered jurisdictions for the considered judgment of the Legislative Branch. The Constitution gives Congress the authority to review and weigh evidence as part of the legislative process and to make factual findings and predictive judgments based upon that evidence. Even if the Court might draw different conclusions if it were weighing the same evidence itself, it should still respect the judgment of Congress and the legislative

process. Giving Congress's factual findings the deference to which they are entitled, the decision to extend § 5 for another 25 years was a reasonable and appropriate exercise of legislative authority.

A. Congress's Factual Findings and Predictive Judgments About the Extent of Voting Discrimination and the Continued Need for § 5 Are Entitled to Substantial Deference.

Turner Broadcasting System, Inc. v. *FCC*, 520 U.S. 180 (1997) illustrates the level of deference that is appropriate in this case. In *Turner*, the Court affirmed the constitutionality of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act against a First Amendment challenge. The Court explained:

> "In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress. Our sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence. . . . [S]ubstantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency. We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions. . . . This is not the sum of the matter, however. We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First

> Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Id.* at 195–96 (citations and internal quotation marks omitted).

The Court further emphasized that "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process," *id.* at 199, and that the Court is not to "re-weigh the evidence *de novo*, or to replace Congress' factual predictions with [its] own." *Id.* at 211 (citation and internal quotation marks omitted).[24] This case involves precisely the same kind of predictive judgments about ongoing harms and the need for remedial measures in a highly complex area that the Court addressed in *Turner*. And here, as in *Turner*, the Court should afford substantial deference to Congress's judgment.

Deference is especially appropriate here given the extensive efforts that Congress undertook to collect evidence and solicit the views of potentially affected parties. Before the bill that would become the 2006 Act was introduced, the House Judiciary Committee's Subcommittee on the Constitution held ten oversight hearings, at which it heard testimony from

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[24] Indeed, the Court made similar points in *City of Boerne*, noting that "[j]udicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'" 521 U.S. at 531 (quoting *Oregon* v. *Mitchell*, 400 U.S. 112, 207 (1970) (Opinion of Harlan, J.)).

39 witnesses, including "State and local elected officials, scholars, attorneys, and other representatives from the voting and civil rights community," as well as receiving written testimony from the Department of Justice, governmental and non-governmental organizations and private citizens. H.R. Rep. No. 109-478, at 5. The Subcommittee then held two additional legislative hearings and received oral and written testimony from another seven witnesses. *Id.* The Senate Judiciary Committee and its Subcommittee on the Constitution, Civil Rights and Property Rights held another ten hearings on the bill, and heard testimony from some 40 witnesses. S. Rep. No. 109-295, at 2 (2006). The hearings included testimony from several well-known critics of § 5 (some of whom now appear as *amici* in this Court). The views that appellant expresses here—that § 5 is no longer necessary, or that changes should be made to the bailout provisions or coverage formula, or that a 25-year extension is too long—were all heard and considered in the legislative process.[25] But when Con-

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[25] *See, e.g., Understanding the Benefits and Costs of Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. 7–9, 15–16, 204–210 (2006) (testimony and prepared statement of Abigail Thernstrom); *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views From the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary*, 109th Cong. 9–11, 13–15, 225–38, 252–64 (2006) (testimony and prepared statements of Gerald A. Reynolds and John J. Park, Jr.); *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary*, 109th Cong. 4–6, 10–11, 13–14, 135–74, 407–15

gress ultimately weighed the evidence, it reached a different conclusion, as it was entitled to do.

It is also significant that the decision to reauthorize § 5 received overwhelming bipartisan support in both houses of Congress—including broad support from the elected representatives of covered jurisdictions. The House of Representatives passed the 2006 Act by a vote of 390–33, while the Senate vote was unanimous, 98–0.[26] The Act was then signed into law by President George W. Bush—himself the former governor of a covered State. The Members of Congress are intimately familiar with voting patterns and electoral practices in the States and districts they represent. These elected representatives are uniquely qualified to make decisions about the extent of ongoing discrimination in voting and the need for § 5, and their judgment should be accorded the highest level of deference.

B. Giving Congress's Findings the Deference to Which They Are Entitled, the Decision To Extend § 5 Was Reasonable.

Congress made a number of factual findings in support of its decision to extend § 5. While appellant quibbles with Congress's interpretation of the evidence, Congress was entitled to draw its own reasonable conclusions from the evidence before it. Viewing Congress's findings in the proper deferential light, there is ample support for the extension of § 5.

(2006) (testimony and prepared statements of Roger Clegg, Michael Carvin, and Abigail Thernstrom).

[26] 152 CONG. REC. H5207 (daily ed. July 13, 2006) (House vote); 152 CONG. REC. S8012 (daily ed. July 20, 2006) (Senate vote).

1. Racially Polarized Voting Patterns

Congress found that "continued evidence of racially polarized voting in each of the jurisdictions covered by [§ 5] demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965." Pub. L. 109-246, § 2(b)(3). Among other things, the House report cited and relied on numerous court decisions finding legally significant racially polarized voting in several covered jurisdictions. H.R. Rep. No. 109-478, at 35. Appellant does not dispute the existence of racially polarized voting, but instead tries to downplay its significance by arguing that racially polarized voting is private action and therefore cannot be addressed by Congress. App. Br. at 48–49.

This argument misses the point. Racially polarized voting is not in itself unlawful, but it is highly significant in determining the potential for unlawful discrimination and the need for remedial measures. Discriminatory voting practices depend on the existence of racially polarized voting for their success. If minority voters do not consistently display different voting preferences from the majority, the majority will have little incentive to engage in discriminatory conduct. But whenever minority voters do display consistently different preferences from the majority, there will be a strong temptation for the majority to try to limit the minority's voting power and political influence. Thus, as the House Report found, "[t]he potential for discrimination in environments characterized by racially polarized voting is great." H.R. Rep. No. 109-478, at 35. The undisputed facts that racially polarized voting continues to exist and that it is especially severe in covered jurisdictions strongly support Congress's decision to extend § 5.

2. Attorney General Objections, Requests for More Information and Withdrawals of Submissions

As evidence of continued discrimination, Congress also cited "the hundreds of objections interposed [and] requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by [§ 5]." Pub. L. 109-246, § 2(b)(4)(A). Congress heard evidence that the Department of Justice had issued some 754 objections since 1982. S. Rep. No. 109-295, at 13–14; H.R. Rep. No. 109-478, at 22, 36. The House Report noted that more objections were lodged between 1982 and 2004 than between 1965 and 1982 and that these objections "did not encompass minor inadvertent changes." *Id.* at 21. It further found that:

> "[V]oting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member districts to at-large voting and implementing majority vote requirements." *Id.* at 36.

The House Report cited numerous examples, including several from the post-2000 redistricting cycle. *Id.* at 36–40. And it found that these proposed changes were "calculated decisions to keep minority voters from fully participating in the political process," showing that "attempts to discriminate persist and

evolve, such that Section 5 is still needed to protect minority voters in the future." *Id.* at 21.[27]

Appellant argues that Congress should have focused on the declining rate of objections as a percentage of the submissions received, rather than the total number of objections. App. Br. at 52. But this is precisely the kind of policy judgment that Congress is entitled to make as part of the legislative process. Congress reasonably chose to focus on the total number of objections, not the percentage. Moreover, Congress did not base its conclusions solely on raw numbers—it also looked in detail at the type of voting changes that had drawn objections and the circumstances surrounding them. *See* H.R. Rep. No. 109-478, at 36–40.

Congress also found that in addition to formal objections, requests by the Justice Department for more information ("MIRs") had "affected more than 800 additional voting changes that were submitted for preclearance, compelling covered jurisdictions to either alter the proposal or withdraw it from consideration altogether." *Id.* at 40–41. Appellant argues that not all of these changes were necessarily discriminatory, and that a jurisdiction's decision to alter or withdraw its submission may indicate a good-faith effort to comply with the law. App. Br. at 53. But Congress could reasonably conclude that *some* of these changes likely were discriminatory, and that

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[27] *See also* H.R. Rep. No. 109-478, at 36 ("The Committee received testimony indicating that these changes were intentionally developed to keep minority voters and candidates from succeeding in the political process.").

they would have been implemented but for § 5.[28] In short, Congress reasonably found that the evidence of objections and MIR letters showed a pattern of ongoing discrimination warranting extension of § 5.

3. Section 5 Enforcement Actions

Congress also found that § 5 enforcement actions undertaken by the Department of Justice since 1982 evidenced continued discrimination and that these actions had "prevented election practices, such as annexation, at-large voting, and the use of multimember districts, from being enacted to dilute minority voting strength." Pub. L. 109-246, § 2(b)(4)(A). The House Report cites numerous examples. H.R. Rep. No. 109-478, at 41–44. Appellant gives short shrift to this evidence, arguing simply that the record of § 5 enforcement litigation shows that individual litigation can be an effective remedy for voting discrimination. App. Br. at 54–55. Congress could reasonably conclude, however, that absent the enforcement mechanism provided by § 5, many of these discriminatory voting mechanisms would have been implemented, and that the alternative of § 2 litigation would not provide an adequate safeguard. *See* discussion *infra* Part III.

4. Judicial Preclearance Actions

Congress found that "the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia" further

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[28] The House Report notes that "[t]he location of the withdrawn voting changes parallels the patterns of objections interposed by the Department of Justice, occurring primarily within the 'Black Belt' of the Southern States." H.R. Rep. No. 109-478, at 41.

evidenced continuing discrimination. Pub. L. 109-246, § 2(b)(4)(B). As the District Court noted, the evidence before Congress showed that "plaintiffs either withdrew their proposed changes or lost on the merits in twenty-five declaratory judgment actions filed since 1982." *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 557 F. Supp. 2d 9, 50 (D.D.C. 2008). Appellant questions whether one of those cases was properly included in the total, since the discriminatory conduct occurred before 1982. App. Br. at 55. But even disregarding this case, Congress could reasonably conclude that twenty-four unsuccessful judicial preclearance suits demonstrates continued discrimination and an ongoing need for § 5.

5. Extent of § 2 Litigation in Covered Jurisdictions

Congress also cited "the continued filing of § 2 cases that originated in covered jurisdictions" as evidence of continued discrimination. Pub. L. 109-246, § 2(b)(4)(C). The House Report noted that more than half of successful § 2 cases in the preceding 25 years had been filed in covered jurisdictions, even though these jurisdictions accounted for less than 39% of the country's total population. H.R. Rep. No. 109-478, at 53. Appellant views the record of § 2 litigation as evidence that § 5 is unnecessary. App. Br. at 47–48. But again, Congress was not required to draw that conclusion—it could reasonably conclude from the number of successful § 2 cases brought in covered jurisdictions that discriminatory practices continue to be a more significant problem in covered than in non-covered jurisdictions.

6. Appointment of Federal Observers

Congress also found that the "tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions" demonstrated the "continued need for Federal oversight in jurisdictions covered by [§ 5]." Pub. L. 109-246, § 2(b)(5). As the House Report explains, observers are assigned to a polling location under § 8 of the Voting Rights Act, 42 U.S.C. § 1973f, "only when there is a reasonable belief that minority citizens are at risk of being disenfranchised." H.R. Rep. No. 109-478, at 44. It noted that this experience "demonstrates that the discriminatory conduct experienced by minority voters is not solely limited to tactics to dilute the voting strength of minorities but continues to include tactics to disenfranchise, such as harassment and intimidation inside polling locations." *Id.* In at least one instance, the personal accounts provided by these observers led to a federal prosecution of county officials for discriminatory conduct against African Americans in polling locations. *Id.* This evidence—which appellant does not address—further supports the reasonableness of Congress's conclusion.[29]

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[29] *Amicus curiae* Southeastern Legal Foundation argues that the dispatch of observers cannot support the decision to reauthorize § 5 because it is "not the result of actual, state-sponsored discrimination in conducting voting" and it is too great a leap to infer discrimination based on the Department of Justice's reasonable belief of a risk of disenfranchisement. SLF Amicus Br. at 29–30. Congress, however, was entitled to take into account the Justice Department's reasonable beliefs. Moreover, Congress considered not just the fact that observers were assigned but also the observations of those observers. *See* H.R. Rep. No. 109-478, at 44 (2006).

* * * * *

In sum, Congress had an ample factual record to support its conclusion that without continuation of § 5, minority voters "will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." Pub. L. 109-246, § 2(b)(9). Even if the evidence could be read to support a different conclusion, Congress was not required to adopt appellant's view of the evidence. The judgment that Congress did make was reasonable and based on a careful consideration of the record, and the Court should defer to that judgment.

III. Case-by-Case Litigation Under § 2 Is Not a Sufficient Safeguard Against Voting Discrimination.

Appellant's argument that § 5 is no longer necessary because § 2 provides a sufficient remedy against discriminatory voting procedures (App. Br. at 54–55) ignores the fundamental difference between the two sections. Section 2 litigation seeks to remedy discriminatory practices that are already in place. Section 5 is designed to *prevent* discriminatory practices from being implemented in the first place. Section 2, while a powerful and necessary tool, does not serve this preventive function.

Congress originally enacted § 5 based on substantial experience showing that individual litigation alone was insufficient to solve the problem of voting discrimination. As the Court explained in *Katzenbach*, prior to 1965 Congress had "repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination." 383 U.S. at 313. But these efforts "proved ineffective for a num-

ber of reasons." *Id.* at 314. The Court noted, for example, that

> "[v]oting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration." *Id.*

Congress was well aware of this history when it extended § 5 in 2006. As stated in the House Report:

> "The Committee knows from history that case-by-case enforcement alone is not enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process. Moreover, the Committee finds that Section 2 would be ineffective to protect the rights of minority voters, especially in light of the increased activity under Sections 5 and 8 over the last 25 years. It is against this backdrop that the Committee finds it necessary to extend the temporary provisions for an additional 25 years." H.R. Rep. No. 109-478, at 57.

Given the Nation's unsuccessful prior experience with a pure case-by-case litigation approach, Congress reasonably concluded that § 2, on its own, is not a sufficient safeguard against discriminatory conduct.

The problems with the case-by-case litigation approach that the Court discussed in *Katzenbach* are as significant today as they were in 1965. First, litigation under § 2 continues to be onerous and expensive. Congress heard evidence that § 2 litigation is "incredibly costly," and that successful plaintiffs are rarely likely to recoup all of their attorneys' fees.[30] Congress also heard evidence that the Federal Judicial Center has ranked voting rights cases as among the most complex and time-consuming cases for judges—just ahead of antitrust cases and behind patent litigation.[31]

The reason that these cases are so costly and complex is that, as the law has evolved, proof of a § 2 claim requires not only extensive factual investigation, but also highly technical expert analysis on such issues as the extent of racially polarized voting, minority cohesion, and whether actual or proposed districts are reasonably compact.[32] As a result, mi-

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[30] *See, e.g., Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong. 92 (2005) [hereinafter "*History, Scope, and Purpose*"] (testimony of Nina Perales).

[31] *See Understanding the Benefits and Costs of Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. 80 (2006) (statement of Armand Derfner); Federal Judicial Ctr., *2003-2004 District Court Case Weighting Study: Final Report to the Subcomm. on Judicial Statistics of the Comm. on Judicial Resources of the Judicial Conference of the United States* 5 (2005).

[32] *See, e.g., Thornburg* v. *Gingles*, 478 U.S. 30, 52–53 & n.20 (1986) (discussing statistical evidence presented by experts using methods of ecological regression analysis and extreme case

nority voters generally do not have the resources to bring § 2 litigation in the first place, much less successfully prosecute such claims to their conclusion. By contrast, it is relatively easy for minority voters to participate in the § 5 administrative process. And where jurisdictions fail to comply with the preclearance requirement, such that judicial action is necessary, § 5 provides a much more simple and straightforward remedy because it does not require the kinds of complex inquiries that are necessary in § 2 cases. Rather, § 5 enforcement litigation turns simply on (a) whether a jurisdiction has changed a voting standard or procedure and (b) whether the change has been judicially or administratively precleared. "If a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change." *Lopez* v. *Monterey County*, 519 U.S. 9, 20 (1996).

Second, because of its complexity, litigation under § 2 is slow. Congress heard evidence that it takes two to five years to litigate an average § 2 lawsuit, and that "[y]ou can't do it any faster than that."[33] It can easily take one or two full election cycles—if not more—before a case is finally resolved. Moreover, outside of the unusual case where a preliminary injunction is granted, the defendant jurisdiction can continue to implement an alleged discriminatory practice while the litigation is under way. As the testimony before Congress made clear, § 5 avoids this

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analysis); GROFMAN, *supra*, at 82–108 (discussing methodology for defining and measuring racially polarized voting).

[33] *See, e.g.*, *History, Scope, and Purpose*, *supra*, at 101 (testimony of Anita Earls).

problem because it prevents discriminatory practices from being implemented in the first place, and where jurisdictions disregard the law, an injunction can be obtained relatively quickly.[34]

Finally, as the *Katzenbach* court noted, one of the drawbacks of case-by-case litigation is that a State or political subdivision that is found to have engaged in discriminatory practices can then switch to a different tactic that will have a similar discriminatory effect, forcing plaintiffs to begin the litigation process over again. As Congress found, § 5 prevents this from happening because it acts as a "shield that prevents backsliding from the gains previously won." H.R. Rep. 109-478, at 53.

In sum, Congress reasonably concluded that § 2, by itself, would not provide a sufficient safeguard against the discrimination that continues to exist in the covered jurisdictions. Again, this Court should defer to that judgment.

CONCLUSION

In 1883, writing for a majority of this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), Justice Joseph P. Bradley powerfully expressed the view that the United States had reached a point at which African Americans no longer needed special legal protections to preserve their rights as citizens:

> "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his eleva-

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[34] *See id.* (testimony of Nina Perales).

> tion when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected." *Id.* at 25.

History proved this view to be tragically wrong. Within a few years after this decision, African Americans in the South had lost virtually all of their most basic civil rights—including the right to vote. It took another eight decades before these rights finally began to be restored.

Appellant in this case advances a view similar to that of Justice Bradley, arguing that the wrongs of the past have been fully rectified and that there is no longer any need for special procedures to protect minorities from discrimination in voting. Congress, however, conducted a thorough review of the evidence and reached a very different conclusion. In light of this Nation's history and the extensive evidence establishing that discrimination and racially polarized voting continue to exist in covered jurisdictions, Congress's decision to extend § 5 for 25 years was wise and should not be disturbed by this Court.

The judgment of the District Court should be affirmed.

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March 25, 2009

APPENDIX A
List of LCCR Member Organizations

A. Philip Randolph Institute

AARP

ACORN

ADA Watch

Advancement Project

African Methodist Episcopal Church

Alaska Federation of Natives

Alaska Inter-Tribal Council

Alliance for Retired Americans

Alpha Kappa Alpha Sorority, Inc.

Alpha Phi Alpha Fraternity, Inc.

American-Arab Anti-Discrimination Committee

American Association for Affirmative Action

American Association of People with Disabilities

American Association of University Women

American Baptist Churches, U.S.A.-National Ministries

American Civil Liberties Union

American Council of the Blind

American Ethical Union

American Federation of Government Employees

American Federation of Labor-Congress of Industrial Organizations

American Federation of State, County & Municipal Employees, AFL-CIO

American Federation of Teachers, AFL-CIO

American Friends Service Committee

American Jewish Committee

American Jewish Congress

American Nurses Association

American Postal Workers Union, AFL-CIO

American Society for Public Administration

American Speech-Language-Hearing Association

Americans for Democratic Action

Anti-Defamation League

Appleseed

Asian American Justice Center

Asian Pacific American Labor Alliance

Associated Actors and Artistes of America, AFL-CIO

Association for Education and Rehabilitation of the Blind and Visually Impaired

B'nai B'rith International

Brennan Center for Justice at New York University School of Law

Building & Construction Trades Department, AFL-CIO

Catholic Charities, USA

Center for Community Change

Center for Responsible Lending

Center for Women Policy Studies

Children's Defense Fund

Church of the Brethren-World Ministries Commission

Church Women United

Citizens' Commission on Civil Rights

Coalition of Black Trade Unionists

Common Cause

Communications Workers of America

Community Action Partnership

Community Transportation Association of America

DC Vote

Delta Sigma Theta Sorority

Disability Rights Education and Defense Fund

Division of Homeland Ministries-Christian Church (Disciples of Christ)

Epilepsy Foundation of America

Episcopal Church-Public Affairs Office

Evangelical Lutheran Church in America

FairVote: The Center for Voting and Democracy

Families USA

Federally Employed Women

Feminist Majority

Friends Committee on National Legislation

Global Rights: Partners for Justice

GMP International Union

Hadassah, The Women's Zionist Organization of America

Hotel and Restaurant Employees and Bartenders International Union

Human Rights Campaign

Human Rights First

Improved Benevolent & Protective Order of Elks of the World

International Association of Machinists and Aerospace Workers

International Association of Official Human Rights Agencies

International Brotherhood of Teamsters

International Union, United Automobile Workers of America

Iota Phi Lambda Sorority, Inc.

Japanese American Citizens League

Jewish Community Centers Association

Jewish Council for Public Affairs

Jewish Labor Committee

Jewish Women International

Judge David L. Bazelon Center for Mental Health Law

Kappa Alpha Psi Fraternity

Labor Council for Latin American Advancement

Laborers' International Union of North America

Lambda Legal

LatinoJustice PRLDEF

Lawyers' Committee for Civil Rights Under Law

League of Women Voters of the United States

Legal Aid Society–Employment Law Center

Legal Momentum

Mashantucket Pequot Tribal Nation

Matthew Shepard Foundation

Mexican American Legal Defense and Education Fund

Na'Amat USA

NAACP Legal Defense and Educational Fund, Inc.

National Alliance of Postal & Federal Employees

National Association for Equal Opportunity in Higher Education

National Association for the Advancement of Colored People (NAACP)

National Association of Colored Women's Clubs, Inc.

National Association of Community Health Centers

National Association of Human Rights Workers

National Association of Latino Elected & Appointed Officials

National Association of Negro Business & Professional Women's Clubs, Inc.

National Association of Neighborhoods

National Association of Protection and Advocacy Systems

National Association of Social Workers

National Bar Association

National Black Caucus of State Legislators

National Black Justice Coalition

National CAPACD

National Catholic Conference for Interracial Justice

National Coalition for the Homeless

National Coalition on Black Civic Participation

National Coalition to Abolish the Death Penalty

National Committee on Pay Equity

National Community Reinvestment Coalition

National Conference of Black Mayors, Inc.

National Congress for Community Economic Development

National Congress for Puerto Rican Rights

National Congress of American Indians

National Council of Catholic Women

National Council of Churches of Christ in the U.S.

National Council of Jewish Women

National Council of La Raza

National Council of Negro Women

National Council on Independent Living

National Education Association

National Employment Lawyers Association

National Fair Housing Alliance

National Farmers Union

National Federation of Filipino American Associations

National Gay & Lesbian Task Force

National Health Law Program

National Immigration Law Center

National Institute For Employment Equity

National Korean American Service and Education Consortium, Inc. (NAKASEC)

National Lawyers Guild

National Legal Aid & Defender Association

National Low Income Housing Coalition

National Organization for Women

National Partnership for Women & Families

National Puerto Rican Coalition

National Sorority of Phi Delta Kappa, Inc.

National Urban League

National Women's Law Center

National Women's Political Caucus

Native American Rights Fund

Newspaper Guild

Office of Communications of the United Church of Christ, Inc.

Omega Psi Phi Fraternity, Inc.

Open Society Policy Center

OCA (formerly known as Organization of Chinese Americans)

Paralyzed Veterans of America

Parents, Families, Friends of Lesbians and Gays

People for the American Way

Phi Beta Sigma Fraternity, Inc.

Planned Parenthood Federation of America, Inc.

Poverty & Race Research Action Council (PRRAC)

Presbyterian Church (USA)

Pride at Work

Progressive National Baptist Convention

Project Equality, Inc.

Religious Action Center of Reform Judaism

Retail Wholesale & Department Store Union, AFL-CIO

Secular Coalition for America

Service Employees International Union

Servicemembers Legal Defense Network

Sigma Gamma Rho Sorority, Inc.

Sikh American Legal Defense and Education Fund

Southeast Asia Resource Action Center (SEARAC)

Southern Christian Leadership Conference

Southern Poverty Law Center

Teach For America

The Association of Junior Leagues International, Inc.

The Association of University Centers on Disabilities

The Justice Project

The National Conference for Community and Justice

The National PTA

Union for Reform Judaism

Unitarian Universalist Association

UNITE HERE!

United Association of Journeymen & Apprentices of the Plumbing& Pipe Fitting Industry of the U.S. & Canada-AFL-CIO

United Brotherhood of Carpenters and Joiners of America

United Church of Christ-Justice and Witness Ministries

United Farm Workers of America, AFL-CIO

United Food and Commercial Workers International Union

United Methodist Church-General Board of Church & Society

United Mine Workers of America

United States Conference of Catholic Bishops

United States Students Association

United Steelworkers of America

United Synagogue of Conservative Judaism

Women of Reform Judaism

Women's American ORT

Women's International League for Peace and Freedom

Workers Defense League

Workmen's Circle

YMCA of the USA, National Board

YWCA of the USA, National Board

Zeta Phi Beta Sorority, Inc.

APPENDIX B
Additional Signatories

In addition to LCCR and LCCREF, the following organizations are signatories to this Brief:

The Black Leadership Forum, Inc. ("BLF") is an alliance of over fifty national African American civil rights and service organizations in the United States. Member organizations are linked together to strategically advocate for the legislative and policy interests of Black people on the international, Congressional, state, county and municipal level. BLF was founded in 1977 under the leadership of Dr. Dorothy Height (Chair and President Emeritus of the National Council of Negro Women), Vernon Jordan (National Urban League), Eddie Williams (Joint Center for Political and Economic Studies), Bill Lucy (Coalition of Black Trade Unionists), Dr. Ramona Edelin (National Urban Coalition) and Dr. Yvonne Scruggs-Leftwich (first executive director). Today's BLF national leaders continue the legacy of leadership passed to them by past advocates of progressive public policy.

Dēmos: A Network for Ideas and Action is a non-profit, non-partisan organization that works to build a robust and inclusive democracy, with high levels of electoral participation and civic engagement; an economy where prosperity and opportunity are broadly shared and disparity is reduced; and a revitalized public sector that works for the common good. Removing barriers to political participation and ensuring full representation of America's diverse citizenry are key to Dēmos' goals. Dēmos actively supported Congress' 2006 reauthorization of the protections of Section 5 of the Voting Rights Act and be-

lieves those protections remain indispensable to the goal of full and equal access to political participation.

Equal Justice Society ("EJS") is a national civil rights organization comprised of lawyers, scholars, advocates and citizens that seeks to protect civil rights and promote equal opportunity for all through law and public policy, public education and research. The primary mission of EJS is to combat the continuing scourge of racial discrimination and inequality in America. Consistent with that mission, EJS has filed and joined *amicus curiae* briefs before this Court to ensure that antidiscrimination law and jurispurdence continue to adequately address racial and societal inequities. In joining *amici*, EJS urges the Court to protect equal access to the political process by deferring to the reasonable judgment of the bipartisan Congress to continue safeguards against voting discrimination.

The National Black Caucus of State Legislators ("NBCSL") is a membership association representing more than 600 African American state legislators hailing from 42 states, the District of Columbia and the Virgin Islands. NBCSL members represent more than 50 million Americans of various racial backgrounds. NBCSL monitors federal and state activity and provides this information to its members through policy symposiums and conferences. NBCSL recognizes that § 5 of the Voting Rights Act has been crucial in enabling thousands of Americans of color to vote for the candidates of their choosing. It has helped provide inclusion in a process that for too long excluded minorities, in particular African American voters. The NBCSL supports and asks that the Supreme Court uphold § 5 of the Voting Rights Act.

The Rainbow PUSH Coalition advances civil and human rights and promotes enlightened civic participation. It has offices in New York, California and Georgia, as well as other states, and its 300,000 members and supporters live in every jurisdiction covered by Section 5 of the Voting Rights Act. Rainbow PUSH regularly conducts voter education activities in most covered jurisdictions.

AMICUS CURIAE BRIEF

No. 08-322

MAR 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC HOLDER, Attorney General of the United States, et al.

Appellees.

CORRECTED COPY

On Appeal from the United States District Court for the District of Columbia

BRIEF OF BARBARA LEE, MEMBER OF CONGRESS AND CHAIR OF THE CONGRESSIONAL BLACK CAUCUS, NYDIA VELÁZQUEZ, MEMBER OF CONGRESS AND CHAIR OF THE CONGRESSIONAL HISPANIC CAUCUS AND MICHAEL HONDA, MEMBER OF CONGRESS AND CHAIR OF THE CONGRESSIONAL ASIAN PACIFIC AMERICAN CAUCUS, ET AL., AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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NALEO EDUC. FUND, NAT'L ASS'N OF LATINO ELECTED & APPOINTED OFFICIALS, 2008 GENERAL ELECTION PROFILE: LATINOS IN CONGRESS AND STATE LEGISLATURES AFTER ELECTION 2008: A STATE-BY-STATE SUMMARY (2008).....6

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INTEREST OF AMICI CURIAE

Amici curiae[1] are elected members of the United States House of Representatives.[2] These elected officials include 41 members of the Congressional Black Caucus ("CBC"), 23 members of the Congressional Hispanic Caucus ("CHC"), and 11 members of the Congressional Asian Pacific American Caucus ("CAPAC") (collectively, the "Tri-Caucus").[3] These caucuses were established to provide representation and constituency service for millions of American voters from communities whose experiences with racial discrimination in voting prompted passage of the Voting Rights Act of 1965. The growth of each caucus's membership has made Congress more racially diverse and inclusive, in large part due to the successful enforcement of the Voting Rights Act's preclearance provisions in covered jurisdictions. Many of these members publicly

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule of the Supreme Court of the United States 37.3. In accordance with Rule of the Supreme Court of the United States 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] A complete listing of all *amici* is attached as Appendix A.

[3] Each of the three caucuses has at least one member who is a U.S. Senator. The signatories to this brief are all members of the U.S. House of Representatives. Further, some members belong to multiple caucuses. See Appendices C-E.

supported and cast floor votes in favor of extending the preclearance provisions in 2006.[4]

The two issues presented in this case are (1) whether petitioner-appellant, a local utility district in Texas, is entitled to preclearance "bailout", under Section 4(a) of the Voting Rights Act and (2) if not, whether the recently renewed preclearance provisions of the Act remain a constitutionally valid exercise of Congress's authority to root out racial discrimination in the area of voting as embodied by Section 2 of the Fifteenth Amendment and Section 5 of the Fourteenth Amendment. Because of the Act's effective record of deterring discrimination in the voting process, *amici* have an interest in defending the preclearance regime to secure the voting rights of the millions of Americans they serve.

SUMMARY OF ARGUMENT

Amici curiae strongly contend that the preclearance requirement outlined in Section 5, 42 U.S.C. § 1973 [hereinafter Section 5], of the Voting Rights Act remains a permissible and effective statutory tool for eliminating and deterring voting discrimination in the political process. Section 5 helps to ensure that state and local jurisdictions do not implement discriminatory voting changes that

---

[4] Other members took office following the reauthorization of the Voting Rights Act in 2006, but signal their support for the legislation by joining as *amici* herein.

might otherwise deny or abridge the right to vote with respect to race.

Steadfast enforcement of the Voting Rights Act, which provides opportunities for voters to participate in the political process and to elect their candidates of choice, has led to greater diversity in Congress along with many state and local legislative bodies. But these changes are of a relatively recent vintage. This is particularly so when compared to the extended period in which the denial and abridgement of the franchise was the norm.

While the advancements for minority voters are rightly lauded, the lesson of America's difficult history of race and politics teaches that these gains are often fragile. The efforts to secure greater levels of political incorporation for racial minority groups have played and continue to play an important role in American Democracy. Yet, as the Jim Crow experience following the derailed Reconstruction aptly demonstrates, withdrawing federal protections that effectively remedy and deter discrimination effectively should be approached with great care.

In light of this history along with a thorough, carefully reviewed record of ongoing voting discrimination in those jurisdictions covered by Section 5, Congress renewed the preclearance requirement with an overwhelmingly bi-partisan vote in 2006. *See* 152 CONG. REC. H5148 (daily ed. July 13, 2006) (statement of Rep. Melvin Watt) (noting that the reauthorization was "the product of a long-

term, thoughtful, and thorough bipartisan deliberation" and that the Voting Rights Act is "arguably the most carefully reviewed civil rights measure in our Nation's history."). That extension was fully warranted to help complete the important task commenced in 1965 – to ensure that every American, regardless of race, enjoys an equal voice in our nation's governance. Accordingly, this Court should find that the reauthorization of Section 5 was within the proper scope of Congressional enforcement authority under the Fourteenth and Fifteenth Amendments.

ARGUMENT

I. The Diversity in Contemporary Politics Is a By-Product of Steadfast Voting Rights Enforcement.

The Voting Rights Act of 1965 "is about protecting the most basic and significant civil right[ ] for all American citizens, the right to vote." 152 CONG. REC. H5152 (daily ed. July 13, 2006) (statement of Rep. Grace Napolitano). Many describe the initial passage of the Voting Rights Act as the start of America's Second Reconstruction. J.. Morgan Kousser, *The Voting Rights Act & Two Reconstructions in* CONTROVERSIES IN MINORITY VOTING 135, 136-37. (Bernard Grofman & Chandler Davidson eds., 1992); *see also* C. Vann Woodward, THE FUTURE OF THE PAST 199 (1989). The Act came in the aftermath of an era characterized by rampant discrimination and brutality. *Amici* John Lewis (D-

GA) reminded Congress in 2006 about the immediate events in March, 1965 that first moved Congress to enact this landmark statute. Long before he was elected to political office, Representative Lewis was a disenfranchised minority voter seeking to have his voice heard: "When we marched from Selma to Montgomery in 1965, it was dangerous. It was a matter of life and death. I was beaten, I had a concussion at the bridge. I almost died. I gave blood, but some of my colleagues gave their very lives." 152 CONG. REC. H5164 (daily ed. July 13, 2006) (Statement of Rep. John Lewis); *see also* John Lewis, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT (1999). Passage of the Voting Rights Act has helped to transform the political landscape in a variety of ways, and signs of the change are evident in today's politics.[5]

For minority groups that have experienced unlawful political exclusion, electing preferred candidates is an important barometer of their incorporation. On this score, notable gains have been made in legislatures at the state and federal levels. These gains are attributable, in large part, to the important protections and safeguards provided by the Voting Rights Act and its Section 5 preclearance

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[5] One of the primary concerns of the Act is increasing political participation. Data on registration and turnout during the relevant enforcement period shows signs of progress for all three non-white communities. See Appendix B. Still, a sizable lag in these measures remains – particularly for Hispanic and Asian American populations -- relative to the national average.

remedy. *See* 152 CONG. REC. H5152 (daily ed. July 13, 2006) (statement of Rep. Linda Sánchez) ("The Voting Rights Act plays a critical role in fulfilling the promise of American democracy. It has given voice to minority communities, and without it, many black, Hispanic, and Asian American leaders would not be holding elected office today."). However, these gains remain fragile as a result of ongoing racially polarized voting and its manipulation by officials. By working to protect districts where minorities have an opportunity to elect candidates of choice, Section 5 of the Voting Rights Act has led to increased diversity in our nation's state and federal legislative bodies. *See generally* QUIET REVOLUTION IN THE SOUTH. (Chandler Davidson & Bernard Grofman eds., 1994).

At the state level, the number of black legislators in preclearance states has grown since the last renewal of Section 5 in 1982. Between 1984 and 1998, the number of black state legislators increased by at least fifty percent in several covered jurisdictions, including South Carolina, Georgia, Florida, New York and Mississippi. David Bositis, JOINT CENTER FOR POLITICAL & ECONOMIC STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 2000 (2002), The ranks of Hispanic state legislators also show similar gains, rising from a national total of 69 in 1985 to 233 by 2006. Their advancement has been most pronounced in the States of California, Florida, Texas, and Arizona (all of which are, in whole or in part, subject to preclearance review). NALEO EDUC. FUND, NAT'L ASS'N OF LATINO ELECTED & APPOINTED OFFICIALS, 2008 GENERAL ELECTION

PROFILE: LATINOS IN CONGRESS AND STATE LEGISLATURES AFTER ELECTION 2008: A STATE-BY-STATE SUMMARY (2008). Asian Americans now serve in a total of 90 state legislative seats nationwide. NATIONAL ASIAN PACIFIC AMERICAN POLITICAL ALMANAC 2007-08, 82 (Don T. Nakanishi & James S. Lai eds., 13th ed. 2007).

Amici themselves provide the clearest evidence of a changed environment in Congress. *See, e.g., Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 109th Cong. (Oct. 20, 2005) (statement of Rep. Sánchez), at 111 (noting that "as the only Latina on the House Judiciary Committee," the hearings regarding the reauthorization of the VRA are "significant to me and thousands [of] residents in my home state of California").

When they first organized, the CBC and CHC collectively numbered fewer than two dozen members. Over the last two decades, however, these groups have grown and have expanded their geographical reach. *See* Appendices C-E. The establishment of CAPAC in 1994 was another important milestone; its ten founding members represented progress when compared to the arrival of the lone Asian-American member of Congress who

served in the 1950s.[6] These groups collectively help make the current Congress a significantly more representative body that better reflects the racial diversity of our nation.[7] Moreover, these members are often at the center of legislative action; many hold key policymaking roles on Capitol Hill.

Critically, these signs of progress at the state and federal levels are directly linked to the critical benefits afforded by Section 5. In addition, this progress is an indicator that Section 5 operates successfully to prevent discrimination in many forms. *Amici* have well-founded concerns about the potential for backsliding and retrenchment in the absence of Section 5's crucial protections. Throughout the reauthorization process, several *amici* urged their colleagues to support reauthorization in light of the significant work left to do. *See, e.g.*, 152 CONG. REC. H5146 (daily ed. July 13, 2006) (statement of Rep. John Conyers) ("And though there is much to celebrate, efforts to suppress or dilute minority votes...are still all too common. I am proud of the progress we have made, but the record shows that we haven't reached a point where the particular

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[6] *See e.g.*, David S. Broder & Kenneth Cooper *Asian Pacific Caucus* WASH. POST May 22, 1994, at A10 (discussing the membership and purposes of the CAPAC).

[7] The current session of the U.S. House of Representatives also includes Rep. Keith Ellison of Minnesota (a member of the CBC) the country's first Congressman of Muslim faith and Rep. Joseph Cao of Louisiana (a member of the CAPAC) its first Vietnamese-American Congressman.

provisions in the act should be allowed to lapse"); *id.*, at H5148, (statement of Rep. Watt) ("We should be clear: although the successes of the Voting Rights Act have been substantial, they have not been fast and they have not been furious. Rather, the successes have been gradual and of very recent origin. Now is not the time to jettison the expiring provisions that have been instrumental to the success we applaud today. In a Nation such as ours, we should want and encourage more Americans to vote, not fewer."); *id.*, at H5164 (statement of Rep. Lewis) ("Yes, we have made some progress. We have come a distance. We are no longer met with bullwhips, fire hoses, and violence when we attempt to register and vote. But the sad fact is, the sad truth is discrimination still exists, and that is why we still need the Voting Rights Act. And we must not go back to the dark path. We cannot separate the debate today from our history and the past we have traveled.").

II. Expansion and Retrenchment In The Long Struggle to Extend the Franchise to Minority Voters.

A common theme found in the briefs filed by opposing parties and their aligned *amici* is that we have entered an era in which discrimination no longer seriously threatens the political rights of minority voters. *See, e.g.*, Brief for Appellant Northwest Austin Municipal Utility District Number One, NAMUDNO v. Holder, No. 08-322, at 1-2, 27.

That notion simply is not consistent with America's long experience with regulating the right to vote, particularly when it comes to extending the franchise to non-white citizens. Nor is it consistent with the record that was before Congress in 2006. As Justice Kennedy only recently observed, "racial discrimination and racially polarized voting are not ancient history." *Bartlett v. Strickland*, No. 07-689, 2009 WL 578634, at *16 (U.S. 2009). These recent steps toward full political incorporation remain fragile and therefore ought to be guarded carefully. This is precisely what Congress sought to do by carefully studying the effects of Section 5 and subsequently reauthorizing the preclearance remedy.

The voluminous Congressional record supporting the 2006 renewal includes testimony from scholars, litigators, historians, experts and others arguing that the right to vote has been contested at almost every point in this nation's history. *See Voting Rights Act: Section 5—Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 67 (2005) While the historical evolution in America has been one in which we have moved to extend the franchise to previously excluded citizens, that movement has regrettably included periods of retrenchment and retraction. ALEXANDER KEYSSAR, THE RIGHT TO VOTE 106 (2000). As Congress recognized in the 2006 reauthorization, the nation's 19th century Reconstruction experience provides a very poignant and telling illustration of our nation's voting rights struggle.

Ratification of the Fifteenth Amendment in 1870 marked an important stage of the effort to secure the fundamental right of citizenship regardless of race. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). Within five years of the Amendment's ratification, Congress passed bills prohibiting voter intimidation and bribery, establishing federal supervision of Congressional elections, and banning extralegal political violence. Kousser, *supra* at 138-39. During this period, black political participation spiked in Southern states, and black state and federal legislators from this region grew to 324 by 1872 – the high point of the Reconstruction era. *Ibid.*

However, the nation's commitment to enfranchise freedmen gave way to political compromise in 1877. C. VANN WOODWARD REUNION AND REACTION 210-20 (1956). The twenty-five years that followed included the dismantling and reversal of anti-discrimination laws. Absent federal protections, black voters and officeholders had no effective means to defend against a widespread campaign to roll back their hard-won gains. Tactics used to restrict or dilute the franchise included gerrymandering, statutory suffrage restriction, and constitutional disfranchisement. All of these manipulative devices utilized state power and were designed with a patently unconstitutional goal – to eliminate every element of black political influence in the South permanently. The strategy was feasible because the federal government had prematurely retreated from the goal of giving full force and effect to the Fifteenth Amendment. *See, e.g., United States*

v. Cruikshank, 92 U.S. 542, 559 (1875); *United States v. Reese*, 92 U.S. 214 (1875).

The change of fortunes for black political incorporation after 1877 was as precipitous as it was predictable. KEYSSAR, *supra*, at 114. As Southern disfranchising tactics became more successful, white supremacists regained political power in state and local government. They then moved quickly to entrench their control over the political process by establishing a racially-exclusive political system. As a consequence of more restrictive and discriminatory provisions, black participation in all forms evaporated in the South. By 1898, the number of black state and federal lawmakers in the former Confederacy had plummeted to ten. The lone black member of Congress, George White from North Carolina, left office in 1901.

Blacks were not the only Americans subjected to these indignities of second-class citizenship. Following the Mexican-American War, the 1848 Treaty of Guadalupe-Hidalgo granted citizenship to thousands of Hispanics who were living in the areas acquired by the United States. Thereafter, Mexican-Americans in particular, and Hispanics and general were saddled by a variety of state laws, including literacy tests, specifically designed to prevent them from exercising their right to vote. Chinese Americans were also barred from voting during this era. *See Voting Rights Act: Section 203 Bilingual Election Requirements: Hearing Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 109th Cong. at 6 (November 8, 2005) (statement of

Rep. Mike Honda) (noting ongoing voting discrimination faced by the Asian and Pacific American community and observing that "Chinese-Americans could not vote until the Chinese Exclusion Acts of 1882 and 1892 were repealed in 1943" and "[f]irst-generation Japanese-Americans could not vote until 1952, because of the racial restrictions contained in a 1790 naturalization law. . . ").

The ugly and prolonged period of racial disfranchisement between 1877 and 1965 is assailable both due to the denial of constitutional rights and governance that remained largely unresponsive to the concerns of minority citizens. During these years, national and state government actors embarked on programs that largely erased any semblance of equality for non-whites. Meanwhile, legislative efforts to prohibit lynching, segregation in housing and education, and other indignities met with incessant filibusters in the U.S. Senate leaving millions of minority citizens without effective representation or redress.

III. Congress Found That Minority Voters Face Ongoing Voting Discrimination in the Covered Jurisdictions

The historical record summarized above teaches that backsliding and retrenchment in the absence of Section 5 hold dire consequences for minority voters. The potential for backsliding was a significant concern in the 2006 Congressional decision to renew the Act. *Amici* and other members of Congress also heard testimony that helped illustrate these risks

from witnesses describing discriminatory voting changes that the Section 5 preclearance provision kept at bay. *NAMUDNO v. Mukasey*, 573 F. Supp. 2d 221, 247-265 (D.D.C. 2008) Although Congress reviewed evidence from a variety of souces, *amici* highlight three categories here:

1. Non-Compliance with Section 5

One category of evidence demonstrating the ongoing need for preclearance enforcement is the persistent unwillingness of some jurisdictions to submit voting changes for review. As Congress found, this resistance illustrates a naked refusal by some jurisdictions to comply with the basic pre-approval requirements codified within Section 5. *See* H.R. REP. NO. 109-478, at 41–44 (2006); *see also* 152 Cong. Rec. H.5143 (daily ed. July 13, 2006) (statement of Rep. F. James Sensenbrenner) ("[H]istory reveals that certain States and localities have not always been faithful to the rights and protections guaranteed by the Constitution, and some have tried to disenfranchise African American and other minority voters through means ranging from violence and intimidation to subtle changes in voting rules. As a result, many minorities were unable to fully participate in the political process for nearly a century after the end of the Civil War. The VRA has dramatically reduced these discriminatory practices and transformed our Nation's electoral process and makeup of our Federal, State, and local governments.").

Three particular instances of non-compliance deserve special note. First, officials in the state of South Dakota made plain their disdain for the review process by avoiding the preclearance mandate for almost thirty years, leaving hundreds of voting changes unexamined. *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 12 (2005) (statement of Laughlin McDonald). Officials subsequently found that several of these unsubmitted voting changes threatened the rights of Native American voters.

Congress also found persuasive similar findings made by this Court in *Lopez v. Monterey County*, 525 U.S. 266, 273 (1999), that officials in Monterey County, California had wrongfully implemented state election law changes that had not undergone preclearance review. This Court also found that related laws dating as far back as 1979 had not, but should have been, submitted for federal preclearance. H.R. REP. NO. 109-478, at 42 (2006). In addition, Congress received evidence showing that federal courts in Monroe, Louisiana enjoined local elections in 1991 due to unreviewed changes in that jurisdiction's election scheme. *Id.* at 43; *see also* Brief of Reps. John Conyers, Jr. et al. as Amici Curiae in Support of Appellees at 17, NAMUDNO v. Holder, No. 08-322 (2009).

Congress examined far more examples of jurisdictions failing to comply with the mandate of Section 5. But these examples are representative of

the kinds of cases that led Congress to find that more time was needed to assess the effect of and compliance with the preclearance mechanism in the covered jurisdictions.

2. Continued Preclearance Objections

A second category of record evidence that Congress reviewed is the significant number of proposed election changes that warranted preclearance objections. H.R. REP. NO. 109-478 at 21 (2006). More than four decades after the enactment of Section 5's preclearance requirement, some state and local jurisdictions continue to invite multiple objections. These objections offer extremely valuable insight about the frequency with which the preclearance remedy successfully prevents discriminatory changes in the election process from taking hold. *See* Brief for Intervenors-Appellees Rodney and Nicole Louis, et al.; Lisa and David Diaz, et al.; Angie Garcia, et al.; and People for the American Way at 30–33, NAMUDNO v. Holder, No. 08-322 (2009) [hereinafter Brief for Intervenors-Appellees].

The redistricting of Louisiana's state legislature offers one of the clearest examples of a state that has been especially resistant to change. Every initial redistricting plan adopted at the start of the decade has failed to satisfy the requirements for preclearance; indeed, the state has received at least one objection for this plan in every cycle since 1965.

Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing on S. 2703 Before the Subcomm. on the Constitution, Civil Rights and Prop. Rights of the S. Comm. on the Judiciary, 109th Cong. 132 (2006) [hereinafter *S. Hearing* 109-822] (statement of Debo P. Adegbile); Brief for Intervenors-Appellees, *supra*, at 34–35,).

Other jurisdictions have shown a proclivity for pursuing suspiciously-timed election changes. In Freeport, Texas, for example, the Department of Justice objected to a proposed change to an at-large system in 2002, just after a Hispanic- preferred candidate won office for the first time in a single member district. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 7 (statement of the Hon. Jack Kemp, former Member of Congress, former Sec'y of Hous. & Urban Dev.) (2005); *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 47 (2005) (testimony of Anita S. Earls).

In Monterey County, California, a similar case involved the local school board. There, white board members sponsored a public ballot measure to prevent more Hispanic- preferred candidates from winning seats on that body. In objecting to that change, the Attorney General found that the proposed shift to at-large elections "contained

language that was expressed in a tone that 'raises the implication that the petition drive and the resulting change was motivated, at least in part, by a discriminatory animus.'" *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After* LULAC v. Perry*: Hearing on S. 2703 Before the Subcomm. on the Constitution, Civil Rights and Prop. Rights of the S. Comm. on the Judiciary*, 109th Cong. 111 (2006) (statement of Joaquin G. Avila). In each instance, preclearance objections helped to shield minority voters from the discriminatory effects of proposed election changes.

3. Racially Polarized Voting

The Congressional record assembled evidence that revealed the deleterious effects of pervasive and persistent racially polarized voting in the covered jurisdictions. H.R. REP. NO. 109-478, at 34–35 (2006). Racially polarized voting facilitates purposeful discrimination because it permits jurisdictions to design methods of election or adopt devices that interact with the polarization to prevent minority voters from electing candidates of choice. *Id*, at 34.

Witnesses before Congress testified about several cases in which racially polarized voting patterns maintained an "election ceiling" that limited the political opportunity for non-white voters and their preferred candidates. *Id.* This pattern held true in cases for voters in different minority communities. As late as 2000, for instance, neither Hispanic nor

Native American candidates had ever won an election in a majority-white election district. *Id.* Since 1966, racial polarization remained a significant obstacle across the South to the success of black candidates for state legislative office outside of majority-black constituencies: "There is little support for the optimistic view that blacks will win many House seats in white majority districts." *S. Hearing* 109-822, *supra*, at 183 (statement of David T. Canon). Similarly, Hispanics are "rarely elected outside of Latino majority districts." Alvaro Bedoya, *The Unforseen Effects of Georgia v. Ashcroft on the Latino Community*, 115 YALE L.J. 2112, 2136 (2006).

Additional evidence heard by Congress adds detail about the negative effects that polarization can have on minority- preferred candidates. Congress received testimony, for example from Professor Theodore Arrington, describing polarization as "a pervasive feature of American politics." *The Continuing Need for Section 5 Pre-Clearance: Hearing on S. 2703 Before the S. Comm. on the Judiciary*, 109th Cong. 9 (2006) (testimony of Theodore S. Arrington).

There was also testimony that revealed the continuing existence of outright racial appeals in some jurisdictions— further evidence of continuing voting discrimination. In fact, in one successful campaign of a black candidate in North Carolina with the last name "Campbell," the candidate elected to use a soup label rather than his own picture for all of his campaign literature. *Id.* at 141 (statement of

Anita S. Earls). Another example concerns a white voter in Southwestern Virginia who told a black Congressional candidate, who had attended a local political function: "It's a pleasure to meet you. You speak very well. You would have done a lot better if you had not made an appearance here because you have a white last name...and we're all voting for those candidates." *Id.* at 140.

The examples described above are far from exhaustive. *See, e.g.*, Brief for Intervenors-Appellees, *supra*, at 14-52. Indeed, other evidence considered by Congress, and detailed in the parties' briefs, includes the Department of Justice's requests for more information (MIRs) regarding proposed voting changes; the deployment of federal observers to jurisdictions where minority voters face polling place barriers; Section 5 enforcement actions; judicial preclearance actions; and evidence yielded by litigation under other provisions of the VRA, including Section 2. Congress also heard powerful and compelling evidence from a significant number of witnesses, including constituents represented and served by *amici*, who helped animate the experience of minority voters throughout the covered jurisdictions.

In its totality, the record presented to Congress was replete with evidence showing problems that were widespread, intransigent, and recent. These lamentable findings quite vividly illustrate the extent

to which the preclearance requirement remains necessary to accomplish the transformative goals of the Fourteenth and Fifteenth Amendments.

IV. Preclearance Is a Crucial Tool for Realizing America's Democratic Goals.

Amici contend that the preclearance requirement provides crucial protection for minority voters, many who live in jurisdictions they represent and serve in Congress. However, these voters are not the only ones whose core political rights are at stake in this case. The continued enforcement of Section 5 also advances an even larger institutional goal that inures to the benefit of every American citizen – pluralist democracy. In this sense, Section 5 helps to ensure that all citizens in the United States enjoy the benefit of a more accessible and equal political system.

Pluralist democracy recognizes the value of diversity within the political process, which can help produce a fuller, more comprehensive national policy. This notion is not at all foreign to the reasoning that led the Founders to establish the U.S. Constitution. They envisioned a nation that was sensitive to differences in ethnicity and class, and one that could employ these diverse interests in its dynamic system of governance and representation. One would be hard pressed to find a better expression of the pluralist ideal than in the motto *E pluribus unum* – out of many, one.

This principle is especially important in representative institutions like legislatures, whose main goal is to address the needs of the public. As House Minority Leader during the floor debate of the 2006 renewal, Representative Nancy Pelosi (D-CA) conveyed this point well: "We all know that America is at its best when our remarkable diversity is represented in our Halls of power. We also know that we will still have a great distance to go in order to live up to our Nation's ideals of equality and opportunity." 152 CONG. REC. H5162. (daily ed. July 13, 2006). A democratic institution based upon pluralism provides the building blocks necessary for politics to function well. Democratic pluralism helps establish a level playing field for individuals with cross-cutting interests and ideas to engage in the "push[ing], haul[ing], and trad[ing]" that is commonly associated with politics. *See Johnson v. DeGrandy* 512 U.S. 997, 1020 (1994). Put another way, it provides the opportunity for coalition-building and compromise to emerge.

Many of the views relevant to shaping public policy are a function of life experience. Of course, common experience is not always bound up with membership in a particular racial group. However, our nation's history is a unique one in which race has, at times, played a significant role in shaping life opportunities and outcomes. Thus, race may be one of the factors that inform perspectives and highlight otherwise overlooked effects of a policy proposal. In similar vein, Justice Sandra Day O'Connor

acknowledged the unique contributions to oral arguments and this Court's conferences that the late Justice Thurgood Marshall imparted upon the court precisely because of his "life experiences." Sandra D. O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

In all of the manners described above, theVoting Rights Act helps government move closer to achieving the goals of a pluralist democracy. It establishes the forum for more meaningful deliberation in institutions, encourages more comprehensive and responsive policymaking, and ultimately strengthens the bond of accountability between voters and their governing institutions. As our country grows increasingly diverse, our governmental institutions must have the capacity to respond to complex problems.

The genius in the design of our constitutional system is that it remains open to innovative methods of making our Union more perfect. The Voting Rights Act and Section 5 are perhaps the best examples of this commitment to improving our democracy. Congress has, in light of historical experience and ample evidence of the present effects of long-term discrimination, found that the preclearance requirement remains an effective tool in this nation's ongoing struggle to guarantee an equal right to vote to all, regardless of race. Accordingly, *amici* urge this Court to uphold Section 5 as a reasonable exercise of Congressional power and as a

fully warranted effort by Congress to continue the solemn task of perfecting our Union.

CONCLUSION

For all of these reasons, *amici* urge this Court to uphold the decision below and find that the preclearance provision remains a constitutionally valid exercise of legislative enforcement authority pursuant to the Fourteenth and Fifteenth Amendments.

Respectfully submitted,

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APPENDIX

APPENDIX A
LISTING OF AMICI CURIAE

Tri-Caucus Chairs

Barbara Lee, Member of Congress and Chair, Congressional Black Caucus (CBC)

Nydia M. Velázquez, Member of Congress and Chair, Congressional Hispanic Caucus (CHC)

Michael M. Honda, Member of Congress and Chair, Congressional Asian Pacific American Caucus (CAPAC)

Congressional Black Caucus

Sanford D. Bishop, Jr., Member of Congress

Corrine Brown, Member of Congress

G.K. Butterfield, Member of Congress

André Carson, Member of Congress

Donna Christensen, Delegate to Congress

Yvette D. Clarke, Member of Congress

William Lacy Clay, Jr., Member of Congress

Emanuel Cleaver, II, Member of Congress

James E. Clyburn, Member of Congress

John Conyers, Jr., Member of Congress

Elijah E. Cummings, Member of Congress

Artur Davis, Member of Congress

Danny K. Davis, Member of Congress

Donna F. Edwards, Member of Congress
Keith Ellison, Member of Congress
Chaka Fattah, Member of Congress
Marcia L. Fudge, Member of Congress
Al Green, Member of Congress *
Alcee L. Hastings, Member of Congress
Jesse L. Jackson, Jr., Member of Congress
Sheila Jackson-Lee, Member of Congress
Eddie Bernice Johnson, Member of Congress
Henry C. Johnson, Member of Congress
Carolyn Cheeks Kilpatrick, Member of Congress
John Lewis, Member of Congress
Kendrick B. Meek, Member of Congress
Gregory W. Meeks, Member of Congress
Gwen Moore, Member of Congress
Eleanor Holmes Norton, Delegate to Congress
Donald M. Payne, Member of Congress
Charles B. Rangel, Member of Congress
Laura Richardson, Member of Congress
Bobby L. Rush, Member of Congress
David Scott, Member of Congress
Robert C. Scott, Member of Congress *
Bennie G. Thompson, Member of Congress
Edolphus Towns, Member of Congress
Maxine Waters, Member of Congress
Diane E. Watson, Member of Congress
Melvin L. Watt, Member of Congress

Congressional Hispanic Caucus

Joe Baca, Member of Congress
Xavier Becerra, Member of Congress *
Dennis A. Cardoza, Member of Congress
Jim Costa, Member of Congress
Henry Cuellar, Member of Congress
Charles A. Gonzalez, Member of Congress
Raúl M. Grijalva, Member of Congress
Luis V. Gutierrez, Member of Congress
Rubén Hinojosa, Member of Congress
Ben Ray Luján, Member of Congress
Grace F. Napolitano, Member of Congress
Salomon P. Ortiz, Member of Congress
Ed Pastor, Member of Congress
Pedro R. Pierluisi, Member of Congress
Silvestre Reyes, Member of Congress
Ciro D. Rodriguez, Member of Congress
Lucille Roybal-Allard, Member of Congress
Gregorio Sablan, Member of Congress *
John T. Salazar, Member of Congress
Linda Sánchez, Member of Congress
José E. Serrano, Member of Congress
Albio Sires, Member of Congress

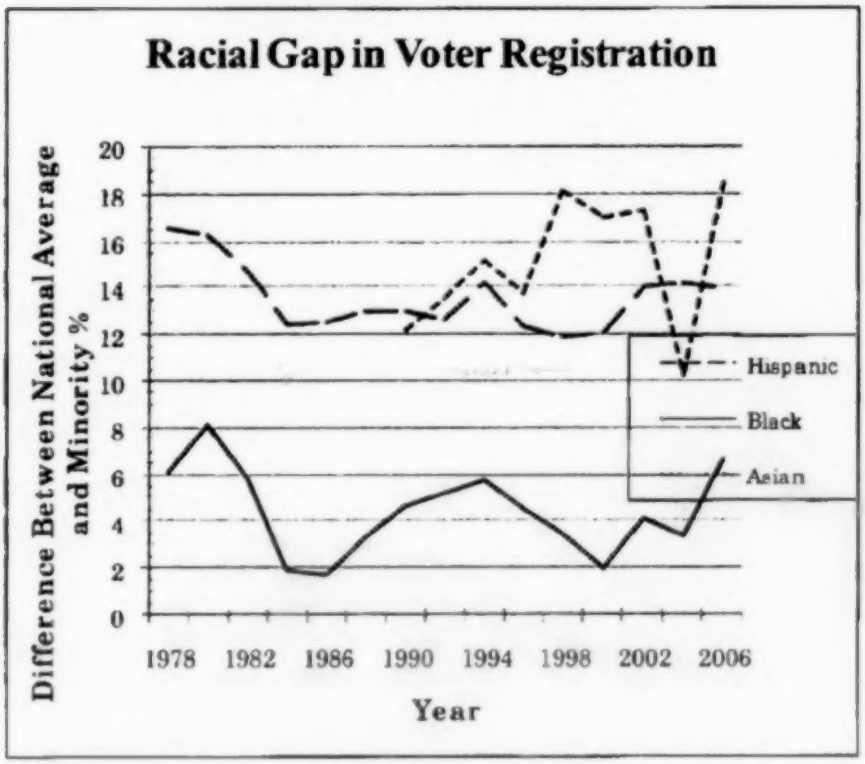
Congressional Asian Pacific American Caucus

Neil Abercombie, Member of Congress
Xavier Beccerra, Member of Congress
Madeleine Z. Bordallo, Delegate to Congress
Eni F.H. Faleomavaega, Member of Congress
Al Green, Member of Congress
Mazie K. Hirono, Member of Congress
Doris O. Matsui, Member of Congress
Gregorio C. Sablan, Member of Congress
Robert C. Scott, Member of Congress
David Wu, Member of Congress

*Also a Member of the CAPAC

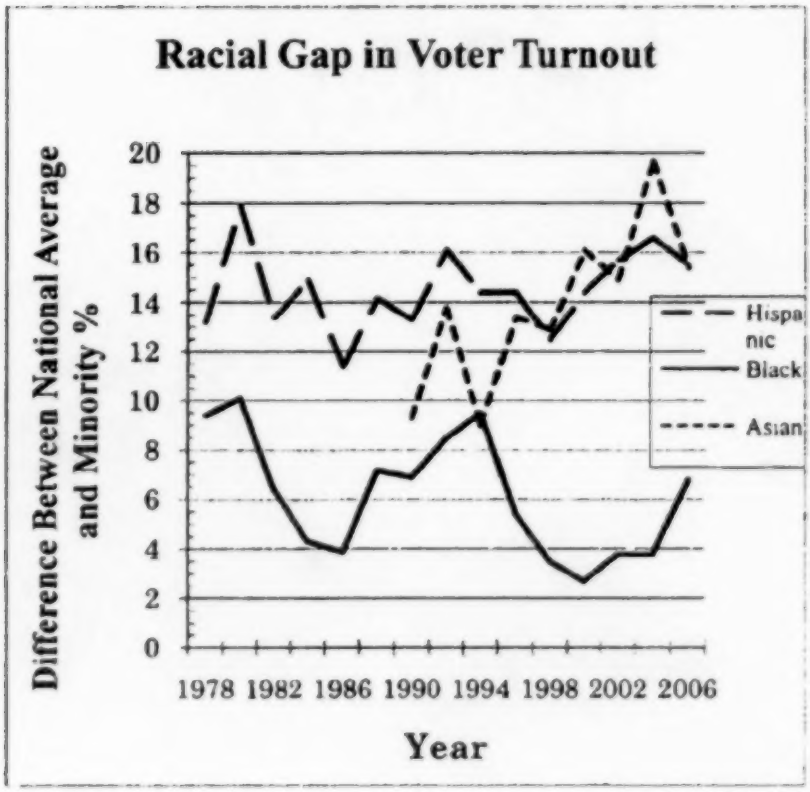
APPENDIX B*

RACIAL GAPS IN VOTER REGISTRATION & TURNOUT



* Source: U.S. Census Bureau, Table A1. Located at http://www.census.gov/population/www/socdemo/voting.html."

APPENDIX B (CONT.)
RACIAL GAPS
IN VOTER REGISTRATION & TURNOUT



APPENDIX C•

MEMBERS OF CONGRESSIONAL ASIAN PACIFIC AMERICAN CAUCUS

Legislator	Yr. Elected	State-Dist.
D.K. Inouye	1962	Sen. – HI
P. Stark	1972	CA –13
E. Faleomavaega	1988	Am.Samoa
D. Akaka	1990**	Sen.– HI
N. Abercrombie	1990	HI – 1
X. Becerra	1992	CA – 31
L. Roybal-Allard	1992	CA – 34
R.C. Scott	1992	VA– 3
Z. Lofgren	1994	CA – 16
B. Lee	1998*	CA –9
D. Wu	1998	OR – 1
M. Honda	2000	CA – 15
B. McCollum	2000	MN – 4
R. M. Grijalva	2002	AZ – 7
M. Z. Bordallo	2002	Guam
A.Green	2004	TX – 9
D. Matsui	2005*	CA – 5
M.K. Hirono	2006	HI – 2

•Source: THE ALMANAC OF AMERICAN POLITICS (Michael Barone & Grant Ujifusa, eds. 2008)

*Special Election. **Appointed to fill a senate seat

APPENDIX C (CONT.)

MEMBERS OF CONGRESSIONAL ASIAN PACIFIC AMERICAN CAUCUS

L. Richardson	2007*	CA – 37
J. Speier	2008*	CA –12
J. Cao	2008	LA – 2
G. Sablan	2008	N. Mariana Islands

*Special election

APPENDIX D•

MEMBERS OF CONGRESSIONAL BLACK CAUCUS

Legislator	Year Elected	State – District
J. Conyers, Jr.	1964	MI –14
C.B. Rangel	1970	NY –15
E. Towns	1982	NY –10
J. Lewis	1986	GA – 5
D M. Payne	1988	NJ –10
M. Waters	1990	CA – 35
E. Holmes Norton	1990	DC
C. Brown	1992	FL – 3
A.L. Hastings	1992	FL – 23
S. D. Bishop, Jr.	1992	GA – 2
B. L. Rush	1992	Il – 1
M. Watt	1992	NC – 12
J. E. Clyburn	1992	SC – 6
E. Bernice Johnson	1992	TX – 30
R. C. Scott	1992	VA – 3
B. Thompson	1993*	MS – 2
C. Fattah	1994	PA – 2
S. Jackson Lee	1994	TX –18
J. L. Jackson, Jr.	1995*	IL – 2
D. K. Davis	1996	IL – 7

•Source: THE ALMANAC OF AMERICAN POLITICS (Michael Barone & Grant Ujifusa, eds. 2008) *SpeciaL Election.

APPENDIX D (CONT.)

MEMBERS OF CONGRESSIONAL BLACK CAUCUS

E. E. Cummings	1996*	MD – 7
C.Cheeks Kilpatrick	1996	MI –13
D. Christensen	1996	US VI
B. Lee	1998*	CA – 9
G. Meeks	1998*	NY – 6
W. Lacy Clay (Jr.)	2000	MO – 1
D. E. Watson	2001*	CA – 33
A. Davis	2002	AL – 7
K. B. Meek	2002	FL – 17
D. Scott	2002	GA – 13
E. Cleaver, II	2004	MO – 5
G.K. Butterfield	2004*	NC – 1
A.Green	2004	TX – 9
G. Moore	2004	WI – 4
H. Johnson	2006	GA – 4
K. Ellison	2006	MN – 5
Y. D. Clarke	2006	NY – 11
L. Richardson	2007*	CA – 37
R. W. Burris	2008**	Sen.– IL
A. Carson	2008*	IN – 7
D. Edwards	2008*	MD – 4
M. L. Fudge	2008***	OH – 11

**Appointed to fill President Barack Obama's U.S. Senate seat

***Elected to fill vacancy of Rep. Stephanie Tubbs Jones's congressional seat

APPENDIX E•

MEMBERS OF CONGRESSIONAL HISPANIC CAUCUS

Legislator	Year Elected	State – District
S. P. Ortiz	1982	TX – 27
J. E. Serrano	1990*	NY –16
E. Pastor	1991*	AZ – 4
X. Becerra	1992	CA – 31
L. Roybal-Allard	1992	CA – 34
L. V. Gutierrez	1992	IL – 4
R. Menendez	2006	Sen. NJ
N. M. Velázquez	1992	NY –12
R. Hinojosa	1996	TXs –15
S. Reyes	1996	TX –16
C. Rodriguez	1997**	TX – 28
	2006	TX – 23

•Source: THE ALMANAC OF AMERICAN POLITICS (Michael Barone & Grant Ujifusa, eds. 2008)
*SpeciaL Election.

**Rep. Rodriguez was originally elected in a special election in District 28. In 2003, the Texas redistricting scheme shifted large numbers of Democratic voters out of District 23 into the already Democratic District 28. As a result, Rodriguez lost the 2004 Democratic primary to Henry Cuellar. Rodriguez was elected in 2006 in the newly drawn District 23 following the invalidation of the Texas redistricting scheme.

APPENDIX E (CONT.)
MEMBERS OF CONGRESSIONAL HISPANIC CAUCUS

G.F. Napolitano	1998	CA – 38
C. A. Gonzalez	1998	TX – 20
J. Baca	1999*	CA – 43
R.M. Grijalva	2002	AZ – 7
D. Cardoza	2002	CA –18
L. Sánchez	2002	CA – 39
J. Costa	2004	CA – 20
J. T. Salazar	2004	CO – 3
H. Cuellar	2004	TX – 28
A. Sires	2006***	NJ – 13
B. R. Luján	2008	NM – 3
G. Sablan	2008	N. Mariana Islands
P. Pierluisi	2008	PR

***Rep. Sires was elected to serve the remainder of Rep. Menendez's term after Menendez was appointed to fill a vacancy in the U.S. Senate.

AMICUS CURIAE BRIEF

No. 08-322

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE HONORABLE CONGRESSMAN JOHN LEWIS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND INTERVENOR-APPELLEES

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STATEMENT OF INTEREST

Amicus Curiae is the United States Representative of Georgia's Fifth Congressional District, which includes the entire city of Atlanta, Georgia and parts of Fulton, DeKalb and Clayton counties, and has served in that capacity since January 1987.[1] *Amicus* respectfully submits this brief in order to urge the Court to affirm the decision of the District Court for the District of Columbia and uphold the constitutionality of Section 5 of the Voting Rights Act of 1965.

Today, political historians and constitutional scholars acknowledge that the main impetus for President Lyndon Johnson submitting the Voting Rights Act to Congress on March 15, 1965, and its passage by both Houses of Congress a mere five months later was the brutalization of non-violent civil rights marchers on the Edmund Pettus Bridge in Selma, Alabama by state troopers. *Amicus* was one of the marchers on that day and, like many of his fellow nonviolent civil rights demonstrators, was beaten with bullwhips, choked with toxic tear gas, and nearly trampled by horses simply because he wished to exercise his constitutional right to vote. *Amicus* does not doubt that the Court will receive numerous well-crafted submissions by the parties and their supporters debating the technical merits of their positions on the

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[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of the brief. The written consent of the Solicitor General of the United States accompanies this brief. The remaining parties have consented to the filing of this brief by filing blanket letters of consent.

constitutionality of the Voting Rights Act. *Amicus* does not intend for this brief to add to the volume of arguments. Rather, as explained below, *Amicus* merely hopes to attest personally to the high price we paid for the enactment of the Voting Rights Act and the still higher cost we might yet bear if we made the mistake of discarding now one of the most vital tools of our democracy.

SUMMARY OF ARGUMENT

No statutory enactment has been more important to the advancement of voting rights for all Americans than the Voting Rights Act of 1965. It is quite simply one of the most significant and influential pieces of legislation Congress has passed. If, as the late President Ronald Reagan once declared, the right to vote is "the crown jewel of American liberties,"[2] the Voting Rights Act of 1965 in general -- and the pre-clearance provisions of Section 5 in particular – is the one piece of legislation that made this crown jewel not just the prized possession of a fortunate few but the birthright of all Americans: It broke the back of Jim Crow segregation, made a place at the table of civic and political life for millions of Americans, and moved us closer to the goal of the "more perfect union" we envisioned at our founding and are still working to achieve today. In sum, the Voting Rights Act made us a better people and America a better place.

And yet, as vital to American democracy as the Voting Rights Act of 1965 has turned out to be, and for

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[2] President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), available at http://www.reagan.utexas.edu/archives/speeches/1982/62982b.htm.

all its success in permitting all Americans to fully participate in the political process, it has always endured, and continues to endure, high-pitched criticism. When it was enacted, as now, we were told not only that the law worked an illegitimate interference with state authority, but that, if we just let each state's political system regulate itself, blacks, other racial minorities, and members of vulnerable classes would achieve fair political representation through the equivalent of the political free-market. At the heart of the argument against Section 5 of the Voting Rights Act lies this unfounded belief that our history has been one of ever forward-moving progress and that we have now arrived at a perfected democratic state, where every piece of legislation or court decision, aiming to guarantee equal rights will only hinder even greater progress.

But, as the late Justice Thurgood Marshall observed on the occasion of the Bicentennial of the United States Constitution, American democracy has always been an ongoing and evolving project.[3] That is to say, democracy is not a fixed state but a series of steps we consciously take day in and day out when we march toward a more enlightened society. One of the first steps toward that more enlightened society was taken when *Amicus* and other marchers walked onto Selma, Alabama's Edmund Pettus Bridge on March 7, 1965. In the ensuing years, as a nation we have marched many more steps to keep faith with our democratic ideals every time we have reauthorized and upheld the constitutionality of the Voting Rights Act.

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[3] Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, 101 Harvard L. Rev. 1 (1987).

Our march is not yet over and we cannot and should not stop now.

ARGUMENT

I

THE VOTING RIGHTS ACT OF 1965 IN GENERAL AND THE PRE-CLEARANCE PROVISIONS OF SECTION 5 IN PARTICULAR REMAIN CRUCIAL IN OUR EFFORTS TO PROTECT THE RIGHTS OF ALL AMERICANS TO VOTE FREE FROM RACIAL DISCRIMINATION

The right to vote is the bedrock of American democracy. Section 5 of the Voting Rights Act was intended to safeguard that right for millions of Blacks, Asians, Latinos and other racial minorities, by prohibiting voting discrimination that might otherwise worsen the position of minority voters. In significant ways, the Voting Rights Act has proved a remarkable success. In 1964, there were only 300 black public officials nationwide. Today there are more than 9,100, including 43 members of Congress. Its expansion in 1975 to include language minorities helped account for the nearly 6,000 Latinos who today hold state or federal office, including 21 members of Congress.

Though there are no more literacy tests and grandfather clauses, today's tools are discriminatory redistricting and annexation plans, at-large elections schemes, unexpected re-registration requirements, sudden polling place changes, and the development of new rules for candidate qualification. All of these methods are used to discriminate against minorities and have led to over 620 objections by the Department of Justice between 1982 and 2006.

To cite just a few specific examples of schemes that call for the continuing need for Section 5, in Georgia alone, the Justice Department has objected to 80 voting changes since the Section 5 reauthorization in 1982. While the State's Governor insists that Georgia should be relieved of the pre-clearance provisions, local newspapers have amply documented the numerous attempts by the state legislature to enact laws that would have a detrimental impact upon blacks and other racial minorities.[4]

In 2002, a state court judge sitting by designation as Superintendent of Elections of Randolph County, Georgia, issued an opinion that an African American member of the Randolph County Board of Education named Henry Cook, was a resident of District 5, the majority black district from which he had been elected. In 2006, however, the County Board of Registrars, all of whose members were white, removed Cook from District 5 and reassigned him to District 4, a majority white district. Given the history of racial bloc voting in Randolph County, Cook would almost certainly have been defeated had he run for reelection in District 4. Randolph County refused to submit Henry Cook's reassignment for preclearance under Section 5, even though it constituted a change in voting. A three-judge court enjoined further use of the change absent preclearance in 2006, in response to a lawsuit filed by black residents of the county against the Board of Registrars. The Board of Registrars then submitted the change for preclearance, and the Department of Justice objected. The Justice Department cited the absence of any intervening

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[4] http://www.onlineathens.com/stories/032009/opi_412284106.shtml.

change in fact or law since the 2002 decision of the state court judge, and ruled that in light of the history of discrimination in voting in the Randolph County, the County failed to sustain its burden of showing that the submitted change lacks a discriminatory purpose.

Even more recently in Georgia, just before the 2008 General Election last November, the State of Georgia implemented a new citizenship verification program for voter registration applicants without obtaining preclearance under Section 5 of the Voting Rights Act. Private parties brought suit against the State under Section 5 and the Georgia Attorney General specifically requested that the State comply with Section 5 and submit the change for review. After the submission was made, the Attorney General requested additional information, and that request remains outstanding. These events surrounding the 2008 presidential election provide a very recent example of the State's failure to comply with Section 5's requirements and undercuts claims presented in *Amici* Perdue's brief to this Court.

II

THE ATTACKS ON SECTION 5 OF THE VOTING RIGHTS ACT AS OVERBROAD AND UNNECESSARY ARE MISLEADING AND WITHOUT MERIT

In spite of its successes, from the time it was first proposed, the pre-clearance provisions of the Voting Rights Act were challenged as an unnecessary and unwelcome abrogation of state authority by the federal government. When Section 5 was first enacted, states that fell within its purview depicted the legislation as a wholesale bureaucratic intrusion by an all-powerful federal government on its federalist subordinates, the state and local governments.[5] In the very first challenge to the pre-clearance provisions taken up by the Court, "South Carolina contend[ed] that . . . only the judiciary [had the authority] to strike down state statutes and procedures [as inconsistent with the Fifteenth Amendment]," and that Congress lacked the constitutional authority to implement the Act. *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1965). Fifteen years later, the City of Rome, Georgia mounted a similar challenge, claiming that Congress in 1965 lacked the constitutional authority to pass the Voting Rights Act, and "in the alternative, that, even if the Act and its pre-clearance requirement were appropriate means of enforcing the Fifteenth Amendment in 1965, they had outlived their usefulness by 1975[.]" *City of Rome v. United States*, 446 U.S. 156, 180 (1975).

It is, therefore, disheartening, though perhaps unsurprising, that today Section 5 is yet again being

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[5] Howard Ball et al., *Compromised Compliance: Implementation of the 1965 Voting Rights Act* 52-53 (1982).

challenged on essentially the very same grounds that opponents of the legislation offered when it was first proposed and continued to proclaim every single time Section 5 came up for renewal; namely that, on the one hand the Act goes too far and that, on the other hand, so much progress has been made that covered states should be relieved from the "burdens" of pre-clearance. Indeed, in a brief submitted to the Court in support of the argument that Section 5 is no longer necessary due to Georgia's progress in voting rights matters, Georgia Governor Sonny Perdue quotes present *Amicus* as stating"[I]t's a different state, it's a different political climate, it's a different political environment. It's altogether a different world that we live in really."[6]

In so doing, Governor Perdue, and others who would oppose Section 5, completely misunderstand and mischaracterize the position that *Amicus* has consistently maintained regarding the necessity of Section 5.[7] As Amicus stated during a floor debate in response to a colleague who had similarly mischaracterized his position:

> Let me say to my friend and to my colleague from the State of Georgia, it is true that years ago I said that we are in

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[6] Brief of Georgia Governor Sonny Perdue as Amicus Curiae In Support of Appellant,
at 6, Nw. Austin Mun. Util. Dist. No. One v. Holder, __ U.S. __ , __ S. Ct. __.

[7] *See* H5164 (Statement of Rep. John Lewis) ("Yes, we have made some progress. We have come a distance. We are no longer met with bullwhips, fire hoses, and violence when we attempt to register and vote. But the sad fact is, the sad truth is discrimination still exists, and that is why we still need the Voting Rights Act. And we must not go back to the dark.

> the process of laying down the burden of race. But it is not down yet... The Voting Rights Act was good and necessary in 1965 and it is still good and necessary today. So don't misquote me. Don't take my words out of context.[8]

As a member of Congress, *Amicus* can testify that reauthorization of Section 5 involved serious deliberation. The arguments like those raised by appellants were given serious consideration and some members initially were of the view that Section 5 had served its purpose. But in the end, based upon the facts presented to Congress, an overwhelming majority of Democrats and Republicans voted to reauthorize the pre-clearance provisions.

The truth is while the experience of *Amicus* in Congress has left him convinced of the continued need for the Voting Rights Act (but respectful of others who sincerely believe otherwise), it has made him, if anything, less patient about some of the abstract, high-pitched arguments against it. Much too often these arguments seem completely divorced from the evidence of history and daily life in the United States. *Amicus* grew up in a time when his fellow citizens looked upon him as a member of a lower caste because he was black and for no other reason. In ways large and small and to an extent that can never be fully conveyed on the page, he was reminded with brutal clarity that he was worth less as a human being than others who happened to be white. The fact that he, and many of his friends and colleagues who died in what is now referred to as the Civil Rights Movement, refused to submit to such an

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[8] *See* H5150 (Statement of Rep. John Lewis).

unjust system is perhaps less a testament to their personal courage than a simple demonstration of their faith in the redeeming power American democracy. And, although it may have seemed, in 1965, that the pre-clearance requirement was an unorthodox imposition, Congress votes every day on legislation that requires States to comply with detailed and sometimes onerous requirements of federal agencies, or that conditions federal funding on substantial changes in State and local laws, or that extinguishes long-established State common law rights with barely a second thought.[9] In 1960, five years before enactment of the Voting Rights Act, James Baldwin wrote: "what is honored in a country is cultivated there."[10] Given the transcendent importance of the right to vote, the history that led to the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, the history of their decades-long non-enforcement, and the powerful federal interest in fair and open elections for federal office, Section 5 of the Voting Rights Act would seem to be nothing less than the cultivation of the American democratic ideals we profess to honor.

In the final analysis, it cannot be denied that as a nation we have made enormous progress toward equal rights for all Americans. But the danger of accepting the argument that we have made so much progress that we no longer need the very tool that made all that progress possible is that we will forget

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[9] *See, e.g.*, National Environmental Policy Act, 42 U.S.C. § 55.

[10] James Baldwin, In Search of a Majority, collected in The Price of the Ticket 231 (1985).

one of the most important lessons history has to teach us, namely:

> that revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward; that enormous gains can be lost and jeopardized, eroded, or diluted, and abridged in spite of the enormous cost that those advances have made. The first [R]econstruction cost us our greatest bloodshed and tragedy. It would seem that if anything has been paid for at a higher price, it was these advances. And yet, they were eroded and lost, and only a century later they were restored.[11]

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[11] Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 97th Cong. 2027 (1982) (statement of C. Vann Woodward, Professor Emeritus of History, Yale University).

CONCLUSION

For the foregoing reasons we pray the Court affirm the decision of the District Court for the District of Columbia and affirm the constitutionality of Section 5 of the Voting Rights Act.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-322

IN THE
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,
Appellant,

v.

ERIC HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF MEMBERS OF THE TEXAS HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici are forty-four Members of the Texas House of Representatives.[2] They are also all members of the Mexican-American Legislative Caucus (MALC), an identified caucus of the Texas House organized and committed to addressing the issues that Latinos face across the state of Texas. Because Congress extended Section 5 of the Voting Rights Act of 1965 and its inclusive preclearance requirement to Texas in 1975 "due to the state's history of excluding Mexican-Americans from the political process,"[3]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief. Counsel for appellant and all appellees other than the Attorney General have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of the Attorney General has been filed with the Clerk.

[2] The Members of the Texas House of Representatives who are joining this brief are listed in the appendix.

[3] Nina Perales, Luis Figueroa & Criselda G. Rivas, *Voting Rights in Texas: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 713, 713-14 (2008); *accord* Janice C. May, Stuart Alexander MacCorkle & Dick Smith, *Texas Government* 57 (8th ed. 1980) ("[W]hen the Voting Rights Act was amended in 1975, Texas was included under Section 5. The amendments added a provision to protect the voting rights of 'language minorities,' which in the case of Texas meant Mexican Americans."). *See also Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 1866–67 (1981) [hereinafter *VRA Extension Hearings*] (testimony of Hon. Barbara Jordan, Former Member, U.S. House of Rep.) (stating that the primary reason for her advocating the VRA's extension to Texas in 1975 was because

Texas Latinos and the members of MALC have a particular interest in retaining the benefit of Section 5 for Texas and its citizens.

SUMMARY OF ARGUMENT

The judgment below should be affirmed. Section 5 of the Voting Rights Act of 1965 (VRA) performs an important role in ensuring that discrimination in Texas does not infect the voting process. Texas's wide array of special purpose districts provides ample opportunities for discriminatory acts that mirror the widespread discrimination that continues to pervade other aspects of Texas society.

"Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute." *LULAC v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993). Indeed, the history of discrimination in Texas can be told largely through the decisions of this Court and the lower federal courts. This Court has rejected, on many occasions, blatant efforts to oppress Texas's minority citizens in virtually every aspect of public life. *See, e.g., Plyer v. Doe*, 457 U.S. 202 (1982) (rejecting a Texas school district's refusal to educate the children of undocumented Mexican aliens); *White v. Regester*, 412 U.S. 755 (1973) (invalidating two multi-member districts in Texas in light of Texas's long history of discrimination against African-Americans and Mexican-Americans); *Terry v. Adams*, 345 U.S. 461 (1953) (finding violations of the Fifteenth Amendment in discrimination on the basis of race in primary elections not governed by the state); *Sweatt*

"the same tactics used to deny blacks the right to vote prior to 1965 were being used against blacks and Hispanics in Texas and in the Southwest in 1975").

v. Painter, 339 U.S. 629 (1950) (rejecting Texas's attempt to maintain segregated law schools); *Smith v. Allwright*, 321 U.S. 649 (1944) (extending protection against discrimination to primaries when primaries become part of the machinery of general elections).

Just three years ago, this Court invalidated Texas's attempt to redraw a congressional district resulting in Latino vote dilution, *LULAC v. Perry*, 548 U.S. 399 (2006), noting that the redistricting "bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id.* at 440. Several Texas school districts remain under federal court supervision for their recalcitrance to their constitutional obligation to desegregate. *See, e.g.*, *Smiley v. Blevins*, 514 F. Supp 1248 (S.D. Tex. 1981). Housing discrimination is so entrenched in some communities that the U.S. Department of Housing and Urban Development (HUD) has assumed control of certain public housing authorities within the state, and law enforcement patterns in many Texas towns continue to reflect racial antagonism. *See* Ross E. Miloy, *HUD Takes Over Agency in East Texas, Citing Bias*, N.Y. Times, Oct. 4, 2000, at A22; Ross E. Miloy, *Arrests by Drug Task Force in Texas Come Under Fire*, N.Y. Times, Apr. 4, 2001, at A14.

In light of that history, the opportunity of minority citizens to participate meaningfully in the election of local governmental officials must be rigorously safeguarded. Local power in much of Texas is wielded by special purpose districts. These districts are pervasive and powerful. They can be created by a few private citizens with relative ease, and their covered population can grow over time—often to the tens of thousands. The governing structure and scope of authority of special purpose districts are flexible and

dynamic, allowing the districts to respond to the changing needs of a growing population.

That flexibility is both a strength and a weakness of special purpose districts. It allows the Texas Legislature to create local governing authorities that can be highly responsive to local needs. At the same time, however, the concentration of dynamic authority in local government officials in an environment still struggling with a history of oppression and discrimination creates a susceptibility to abuse. In such an environment, the importance of continuing oversight to ensure the fairness and integrity of the electoral process cannot be overstated.

ARGUMENT

I. TEXAS RELIES ON SPECIAL PURPOSE DISTRICTS TO FILL LARGE GAPS IN COUNTY GOVERNING AUTHORITY

Texas is a vast state, and only a small percentage of its physical territory is located within city boundaries. *See* Texas Comptroller of Public Accounts, *Demographics – Texas in Focus: Statewide View of Opportunities*, *at* http://www.window.state.tx.us/specialrpt/tif/population.html (last visited Mar. 15, 2009) (noting that 80% of Texas's total land area is rural). The rest of the state, more than 209,000 square miles, is governed by county governments with very limited regulatory, taxing, and eminent domain authority. *See* David B. Brooks, *County and Special District Law*, 35 Texas Practice Series § 1.4 (2d ed. 2008). More than eighteen million people live in these unincorporated areas, and those residents have needs for local services similar to those of urban dwellers. *See* U.S. Census Bureau, *Population Estimates for All Places: 2000 to 2007* (2008), *at* http://www.census.gov/popest/cities/SUB-EST2007-4.

html (linking to spreadsheet showing population estimates for all incorporated areas in Texas). Indeed, many unincorporated areas are contiguous with and indistinguishable from their nearest urban neighbors. In Harris County, for example, a steady exodus of residents from urban areas has resulted in extensive suburban-style developments in both incorporated and unincorporated areas; the population of the latter has now reached 1.38 million out of a Harris County total of 3.9 million. *See* Bill Murphy, *You Can Run, But Can't Hide, From Traffic*, Houston Chron., May 5, 2008, at A1. Accordingly, the Texas Legislature has authorized the creation of more than 3,300 special purpose districts to provide essential infrastructure and governmental services to its citizens living outside city limits. *See* Wilbourn E. Benton, *Texas: Its Government and Politics* 20 (2d ed. 1966).

A. Texas Counties Have Limited Governmental Authority

County government structure in Texas was established by the Constitution of 1876 to meet the needs of a rural agricultural population and has not changed in essential character since that time. There were twenty-three Mexican "municipalities" north of the Rio Grande River at the time of the Texas Revolution. These municipalities became the first twenty-three counties with the adoption of the Republic of Texas's Constitution in 1836. *See* Brooks, *supra*, 35 Texas Practice Series § 1.4. There are now 254 counties in Texas, more than in any other state. The last one—Loving County—was created in 1931. *See* http://www.tshaonline.org/handbook/online/articles/LL/hcl13.html. While the number of counties has grown by a factor of ten since Texas's independence, their delegated authority has remained essentially the same.

Under the Texas Constitution, Texas counties are administrative subdivisions of the state and therefore lack home-rule authority.[4] Tex. Const. art. XI, §§ 1, 2. As such, Texas counties exercise only the limited authority conferred on them by the Texas Constitution and state legislation. That authority remains primarily directed at rural agricultural issues, such as road and drainage construction, the abatement of public nuisances, and the construction and maintenance of reservoirs for irrigation and flood control. Neither the Texas Constitution nor any subsequent legislative enactment confers on counties general land use regulatory authority, the general power of eminent domain, or the general authority to issue bonds and incur debt. Rather, these powers are sparingly assigned to particular counties, or to all counties for a particular purpose. For example, certain border counties were granted limited land use planning authority and the authority to provide water and waste water services to residents in 1989 to combat the proliferation of *colonias* along the Texas-Mexico border. *See* Tex. Loc. Gov't Code Ann. § 412.015. And all 254 counties enjoy the power of eminent domain for the particular purpose of acquiring rights-of-way and other lands necessary to construct reservoirs, dams, levees, wells, canals, or other improvements required for the proper and efficient irrigation of land in the county. *See* Tex. Gov't Code Ann. § 1474.151.

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[4] In 1933, the Texas Constitution was amended to permit counties to initiate home-rule charters. *See* Tex. Const. art. XI, § 3. Thirty-six years later that provision was repealed, without any county having taken advantage of the opportunity to secure home-rule authority.

Moreover, Texas courts have construed even those limited powers narrowly. *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 31–32 (Tex. 2003) (holding that counties "have limited authority . . . [and] possess[] only those powers expressly conferred by the Texas Constitution and the Legislature, and those necessarily required to perform their delegated duties"); *see also Crane v. Texas*, 534 F. Supp. 1237, 1244 (N.D. Tex. 1982) ("[C]ounty government provides relatively few direct services to citizens. In addition, their capacity to respond to local needs and desires is limited and those powers are narrowly construed by the courts."), *aff'd in part, rev'd in part on other grounds*, 759 F.2d 412, *amended on denial of reh'g*, 766 F.2d 193 (5th Cir. 1985).

The abilities of Texas counties to provide basic social services to their residents are further limited by the county governing structure created by the Texas Constitution. Every Texas county, regardless of its size, geography, location, or population, functions under the same constitutional restrictions and basic organizational structure. *See* Tex. Const. art. V, § 18 *et seq.* (establishing the commissioners court system of county governance); *Invisible Government: Special Purpose Districts in Texas*, Texas Senate Research Center 2 (2008). Each county is governed by a "commissioners court" composed of a "county judge" and four county commissioners, as well as several other elected county officials, such as the County Clerk and the Tax Assessor-Collector.[5] *See* Tex. Const. art. V, § 18. The commissioners court conducts the general business of the county, but has

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[5] The Tax Assessor-Collector is the official voting registrar of the county, while the County Clerk is the chief election officer of the county. *See* Tex. Elec. Code Ann. §§ 12.001, 13.091(1).

no oversight authority over the other elected officials. The lack of central administrative control remains "an inherent problem of county government." Brooks, *supra*, 36A Texas Practice Series § 1.10. Indeed, county government in Texas has been criticized as "obsolete" and "burdened with a 'nineteenth-century political organization.'" *Id.* §§ 1.1, 1.10.

B. Special Purpose Districts Are Created To Provide Services That County Governments Cannot

Texas relies on special purpose districts to fill the gaps in regulatory authority caused by its unique county governance structure. Special purpose districts are quintessentially local and highly specialized. They provide particularized services directly to their members, and target their taxing and regulatory authority to their service population. In general, special purpose districts are "an effective way to keep government at home 'close to the people.'" James A. Hankerson, *Special Governmental Districts*, 35 Texas L. Rev. 1004, 1007–08 (1957).

The attractiveness of special purpose districts has caused Texas to create more such districts, responsible for more government functions, than virtually any other state.[6] In 2007, there were approximately 3,372 special purpose districts in Texas. *See 2007 Census of Governments*, *supra*. While almost one-third of these are Independent School Districts, Texas law authorizes the creation of at least forty-seven

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[6] California and Illinois are the only states that have more special purpose districts than Texas. *See* U.S. Census Bureau, *2007 Census of Governments: Government Organization, Local Governments and Public School Systems by Type and State: 2007*, *at* http://www.census.gov/govs/cog/GovOrgTab03ss.html.

different types of special purpose districts. *See generally* Brooks, *supra*, 35-36A Texas Practice Series.

C. Because They Are Easy To Create, Endowed With Extensive Regulatory Authority, And Extraordinarily Flexible In Size And Scope, Special Purpose Districts Provide Unique Opportunities To Disenfranchise Minority Voters

Special purpose districts are creatures of both constitutional and statutory law. Several provisions scattered throughout the Texas Constitution authorize the creation of special purpose districts. *See, e.g.*, Tex. Const. art. III, § 52 (general authority to create special purpose districts), art. XVI, § 59 (conservation and reclamation districts), art. IX, §§ 5, 7-9B, 13 (hospital districts), art. II, §§ 48e, 48f (emergency services districts and jail districts). The districts themselves are then created either by special legislation establishing a particular special purpose district or through a process established in more general statutory provisions defining the governance, structure, and powers of the different types of special purpose districts.

Those special purpose districts that are not created by special legislation often can be created through a petition process initiated by just a few people. To create an Independent School District, for example, a petition containing the signatures of at least 10% of the registered voters in the proposed school district is submitted to the county judge, who then orders an election to approve the creation of the district. *See* Tex. Educ. Code Ann. ch. 13. In a rural area with only ten registered voters, one signature is suf-

ficient to initiate the petition process.[7] Similarly, to create a groundwater conservation district, a majority of the landowners in the proposed district (or fifty landowners, whichever is fewer) may submit a petition to the Texas Commission on Environmental Quality (TCEQ), which then holds a public hearing, certifies that the petition is complete, and sets an election to approve the creation of the district. Texas Commission on Environmental Quality, *What is a Groundwater Conservation District (GCD)?* 1 (2008), *at* http://www.tceq.state.tx.us/assets/public/permitting/watersupply/groundwater/maps/gcd_text.pdf. Municipal Utility Districts (MUDs) are also created by petition process. To create a MUD, landowners submit a petition signed by a majority in value of the holders of land within the proposed district (or fifty landowners, whichever is fewer) to the TCEQ, which evaluates its sufficiency and, if satisfied, grants the petition creating the MUD and appointing five temporary directors. *See* 30 Tex. Admin. Code § 293.11 (2009).

Under each of these petition processes (and similar petition processes applicable to many other special purpose districts), residents of a sparsely settled region can successfully create a special purpose district with just a few signatures and, if applicable, a few additional votes in the approval election. In 2008, for example, the Roberts County Fresh Water Supply District (RCFWSD) was created by a petition signed

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[7] While this demographic may seem implausible, the inhospitable West Texas landscape renders this scenario commonplace. Roberts County, Texas, for example, covers 924 square miles and boasts 900 residents—fewer than one resident per square mile. *See* Susan Berfield, *There Will Be Water*, BusinessWeek, June 23, 2008, at 40.

by one (corporate) landowner—Mesa Water Company. The only five residents on the land covered by the district were named as the district's directors, and the district's creation was approved by unanimous vote of the two eligible voters. The RCFWSD covers only eight surface acres, but provides access to the Ogallala Aquifer containing millions of dollars worth of groundwater subject to the common-law rule of capture. *See* Berfield, *supra*, at 42. Indeed, appellant Northwest Austin MUD No. 1 was created after an election in which just two ballots were cast in 1986. *See* JA 394–95.

The range of services provided by the different types of special purpose districts is broad—from services as fundamental as education, electricity, water, and wastewater, to those as esoteric as mosquito and wind erosion control.[8] And the regulatory authority of such districts is as broad as the scope of the services themselves. While some special purpose districts merely promote certain policies and have very limited governmental powers,[9] many possess or can acquire extensive taxing, regulatory, debt issuance, and eminent domain authority.

In fact, many special purpose districts enjoy broad governing authority more closely resembling that of a

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[8] *See* Tex. Educ. Code Ann. § 22.12 (common school districts); Tex. Water Code Ann. §§ 51.012–51.013 (water control and improvement districts); Tex. Health & Safety Code Ann. § 344.001 (mosquito control districts); Tex. Agric. Code Ann. § 202.011 (wind erosion districts).

[9] Soil and Water Conservation Districts, for example, have no authority to levy taxes, impose and collect assessments, issue bonds, or acquire property through condemnation. They are created to promote conservation land use practices for the benefit of the "farm and grazing lands of the State of Texas." Tex. Agric. Code Ann. § 201.001.

home-rule city than a subdivision of the state. MUDs provide a good example. MUDs are generally created to provide water and wastewater services to new developments in unincorporated areas.[10] They enjoy expansive authority to undertake virtually any measure necessary to supply water, collect and dispose of waste, control local storm water, irrigate land, alter land elevation, and navigate coastal and inland waters. *See* Tex. Water Code Ann. §§ 54.201(b), § 54.203. MUDs can create and maintain recreational facilities, including parks, landscaping, trails, beautification projects, street lighting, and equipment. *See id.* §§ 49.462-49.463. The Texas Constitution authorizes MUDs to engage in fire-fighting activities and to issue bonds for that purpose. *See* Tex. Const. art. XVI, § 59f. MUDs can acquire interests in "land, materials, waste grounds, easements, rights-of-way, equipment, contract or permit rights or interest," either inside or outside district lines. Tex. Water Code Ann. § 49.218(a). In 1995, MUDs acquired the power of eminent domain over any land, easement, or other property inside or outside the district boundaries necessary for its projects or purposes. *See id.* § 49.222(a). MUDs can issue bonds to repair and maintain roads. *See id.* § 54.522. They may also collect necessary charges and fees in addition to collecting property taxes. *See id.* §§ 49.107, 49.212, 49.231. Finally, MUDs can contract for peace officers, including police officers, with power to make arrests to enforce the laws of the district and the state. *See id.* § 49.216.

Independent School Districts also wield substantial regulatory authority over residents. The board of

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[10] In 2002 there were more than 575 MUDs in Texas. *See* Brooks, *supra*, 36A Texas Practice Series § 46.71.

trustees of the school district is authorized to adopt rules and bylaws necessary to carry out the duties of the district. *See* Tex. Educ. Code Ann. § 11.151. The board may issue bonds and assess taxes, *see id.* § 11.1511, sell mineral rights, *see id.* § 11.153, and donate land, *see id.* § 11.1541. And school districts can exercise the right of eminent domain to secure sites on which to construct school buildings or for any other purpose necessary for the district. *See id.* § 11.155.

Special purpose districts in Texas wield this extensive power on behalf of their resident members, which can range from as few as one person to as many as hundreds of thousands of people.[11] More commonly, special purpose districts start small and grow over time, easing their creation by limiting participation to just a few members, and maximizing their effectiveness over time by serving many more.

Thus, the very characteristics that make special purpose districts so efficient and effective—ease of creation, flexibility in governance, extensive governing authority, and intensively local control—provide incentives and opportunities for abuse. In a state like Texas, which is still emerging from a long history of discrimination and electoral exclusion (see *infra* Part II), it makes little sense to permit these special purpose districts to bail out of judicial oversight intended to ensure that power is not consolidated at the expense of underrepresented minorities.

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[11] The Houston Independent School District, for example, serves more than 200,000 students. *See* Houston Independent School District, *Facts & Figures* 1 (2007), *at* https://www.houstonisd.org/HISDConnectEnglish/Images/PDF/FactsFigures07.pdf.

II. DISCRIMINATION CONTINUES TO PERVADE ALL ASPECTS OF TEXAS SOCIETY GOVERNED BY SPECIAL PURPOSE DISTRICTS

Much of the discrimination that required passage of the Voting Rights Act (VRA) continues to this day in Texas. Such discrimination is prevalent in special purpose districts, which have significant potential to affect the everyday lives of residents due to the important role such districts play in local government in Texas. As seen in the sheer number of voting rights objections, the VRA continues to play an important role in combating the discrimination that so clearly pervades all aspects of society—including education, housing, and law enforcement.

A. The Voting Rights Act Continues To Play A Vital Role In Texas, In Particular With Regard To Special Purpose Districts

Section 5 of the VRA remains critically important civil rights legislation in the political landscape of Texas, and its preclearance procedures remain necessary to ensure equal franchise to all Texas residents, particularly racial and language minorities. *See* Perales, 17 S. Cal. Rev. L. & Soc. Just. at 713; *see also Quiet Revolution in the South: The Impact of the Voting Rights Act* 1965–1990, at 255 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter *Quiet Revolution*]. In the first six years following Congress's extension of Section 5 to Texas, "Texas received more letters of objection than any state covered under Section 5 for 16 years." *VRA Extension Hearings*, *supra*, at 1877 (prepared statement of Vilma S. Martinez, President and General Counsel, Mexican American Legal Defense and Educational Fund).

Moreover, "[b]etween the time Texas was brought under section 5 coverage in 1975 and December 1990, the Justice Department interposed 131 objections to voting procedures in the state," with many of these objections being raised with respect to "multiple infractions of voting law within a single jurisdiction." *Quiet Revolution*, *supra*, at 246. As several observers have commented, these infractions "embraced the spectrum of illegal procedures: racial gerrymandering, discriminatory purges of registered voters, imposition of numbered posts and the majority runoff requirement, annexations that diluted minority votes, a faulty bilingual oral assistance program, reduction in the number of elected officials, transfer of duties from one official to another, and unfair changes in election dates." *Id.*; *see also* Perales, *supra*, 17 S. Cal. Rev. L. & Soc. Just. at 728. Nearly 40% of those objections have been lodged against changes in voting procedures proposed by special purpose districts like MUDs. *See* U.S. Dep't of Justice, *Section 5 Objection Determinations: Texas*, *at* http://www.usdoj.gov/crt/voting/sec_5/obj_activ.php (last visited Mar. 6, 2009) (showing that, of DOJ's 201 Section 5 objections since 1975, seventy-five were aimed at changes proposed by special purpose districts).

Finally, Section 5 continues to have a strong deterrent effect in Texas. Since 1982, Texas has had the largest number of Section 5 submissions withdrawn by jurisdictions after the DOJ objected and also "the largest number of electoral changes deterred by MIRs ["More Information Requests"], with 366 changes either withdrawn, changed, or dropped since 1982." Perales, *supra*, 17 S. Cal. Rev. L. & Soc. Just. at 730–31 ("Section 5 plays a critical role in protecting minority voters—even when state officials are

recalcitrant and fail to comply with it. However, Texas's failure to comply with Section 5 also shows that the state has a long way to go before it fully ensures equal voting opportunities to all of its voting-age citizens."). As one author observed, "one can only speculate about the number of discriminatory changes that would have occurred but for the deterrent effect of section 5." *Quiet Revolution*, *supra*, at 246.

The long history of voter discrimination in Texas, as well as the frequency of Section 5's use in Texas as compared to other covered jurisdictions, all support the conclusion that Section 5 is as pertinent as ever to the state, particularly in the context of voting changes proposed by special purpose districts like appellant. That need is particularly great because discrimination continues to infest the core activities that underlie the vast bulk of special purpose districts in Texas.

B. Texas Independent School Districts Continue To Discriminate Against Minorities On The Basis Of Language And Race

Independent School Districts (ISDs) are among the most significant special purpose districts in Texas. Approximately 1,400 ISDs have been chartered in the state. *See* Nikki Weingarten, *Schools Still Trying to Rid Themselves of Segregation Label*, Digital Journal, Jan. 12, 2009, *at* http://www.digitaljournal.com/article/265051. Ranging from huge urban districts serving almost a quarter of a million students to small rural districts with one high school, they bear the critical responsibility of educating the state's primary and secondary students. *Compare* Houstonisd.org, *2009 Facts and Figures*, *at* http://www.houstonisd.org/HISDConnectDS/v/index.jsp?vgnextoid=62c6757761efc010VgnVCM10000052147fa6RCRD

&vgnextchannel=2e2b2f796138c010VgnVCM100000
52147fa6RCRD (last visited Mar. 22, 2009) (reporting that Houston Independent School District had 200,225 students enrolled in the 2008–2009 school year), *with* Cottoncenterisd.org, *2006–2007 Academic Excellence Indicator System*, *at* http://www.cotton centerisd.org/public%20Docs/Academic%20Excellence.pdf (last visited Mar. 22, 2009) (reporting that Cotton Center Independent School District had only 161 total students in the 2006–2007 school year). Across the state, these special purpose districts continue to struggle with their obligations to offer this education in a nondiscriminatory manner.

That struggle is chronicled in the Federal Reports. In the past half century, the state itself and virtually every major school system within its borders have been found by a court to have operated a racially dual system of education. *See, e.g.*, *United States v. Texas Educ. Agency*, 467 F.2d 848 (5th Cir. 1972) (Austin); *Houston Indep. Sch. Dist. v. Ross*, 282 F.2d 95 (5th Cir. 1957); *Borders v. Rippy*, 247 F.2d 268 (5th Cir. 1957) (Dallas); *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970) (state-wide), *aff'd*, 447 F.2d 441 (5th Cir. 1971); *Flax v. Potts*, 204 F. Supp. 458 (N.D. Tex. 1962) (Fort Worth), *aff'd*, 313 F.2d 284 (5th Cir. 1963). In 1970, a federal court declared that Texas ISDs were responsible for creating and maintaining dual school systems and that "the vestiges of racially segregated public education" had not been eliminated in the state. *United States v. Texas*, 321 F. Supp. at 1058. As a result, the court entered an extensive desegregation decree that is still in effect in Texas today. *See United States v. Texas*, No. 6:71-CV-5281 (E.D. Tex. Dec. 17, 2008) (affirming the ongoing need for a federal order requiring Texas independent school districts to deseg-

regate); *see also United States v. Edgar*, 404 U.S. 1206, 1207 (1971) (Black, Circuit Justice) (upholding the original order, stating that "it would be very difficult for me to suspend the order of the District Court that, in my view, does no more than endeavor to realize the directive of the Fourteenth Amendment and the decisions of this Court that racial discrimination in the public schools must be eliminated root and branch").

Although Texas has made great strides in eradicating discrimination in its schools, significant problems persist. Nine school districts in the state remain under a federal court order to desegregate. *See* Rhiannon Meyers, *Galveston Schools May Be Declared Desegregated After 50 Years*, Khou.Com, Jan. 8, 2009, *at* http://www.khou.com/news/local/galveston/stories/khou090108_tnt_galveston-desegregation.5baa697.html; Nikki Weingarten, *Schools Still Trying to Rid Themselves of Segregation Label*, Digital Journal, Jan. 12, 2009, *at* http://www.digitaljournal.com/article/265051.

Moreover, even the "unitary" school districts in Texas may not have entirely eradicated their past discriminatory practices. *See, e.g., Samnorwood Indep. Sch. Dist. v. Texas Educ. Agency*, 533 F.3d 258, 260 (5th Cir. 2008) (holding that Court Order 5281 did not apply to the plaintiff school district not because there was a finding of no discrimination in the school district, but because it was not a party to the original lawsuit). And some districts have avoided court intervention not because of the absence of discrimination, but because a court found no practical remedy available to eliminate all vestiges of discrimination. *See, e.g., Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 224, 228 (5th Cir. 1983); *Flax v. Potts*, 725 F. Supp. 322, 330 (N.D. Tex. 1989), *aff'd*

and remanded, 915 F.2d 155 (5th Cir. 1990). Such districts continue to face litigation.

The VRA remains an important tool, in addition to the enforcement of substantive constitutional rights, in the ongoing efforts to ensure equal educational opportunity for all Texans. Of the nearly 200 objections raised under Section 5 of the VRA in Texas, 65 of them have involved ISDs. *See* DOJ.gov, *About Section 5 of the Voting Rights Act*, *at* http://www.usdoj.gov/crt/voting/sec_5/tx_obj2.php (last visited Mar. 12, 2009). And, in 2003, a federal district court in Texas denied the Dallas ISD's motion to dismiss a Section 5 suit filed by language-minority plaintiffs who claimed that the school district had implemented a discriminatory redistricting plan without preclearance. *See Villegas v. Dallas Indep. Sch. Dist.*, No. 302CV0858R, 2003 WL 22573921, at *10 (N.D. Tex. Oct. 17, 2003). The court held that it could "not conclude beyond doubt that DISD secured preclearance of the majority Hispanic voting age requirement." *Id.*

Indeed, as recently as 2003, this Court recognized the ongoing importance of the narrowly tailored use of race as an admissions criterion for law schools. *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (overruling *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996)). As Justice Ginsburg observed in her concurrence, "[c]onscious and unconscious race bias, even rank discrimination based on race, remain alive in our land." *Id.* at 345.

C. Discrimination Against Minorities In Housing—Both Public And Private—Persists In Texas

Minority residents in Texas have faced continuous and systematic discrimination in public housing. In 1982, a federal district court certified a class-action

lawsuit alleging racial discrimination in public housing and ordered 36 counties in Texas to desegregate housing projects. *See Young v. Pierce*, 544 F. Supp. 1010 (E.D. Tex. 1982). In 1988, the court revisited the issue and found that conditions not only had failed to improve, but also had deteriorated in some instances: "In more than two years since the liability finding in this action, five [public housing authority (PHA)] sites, formerly racially mixed, have regressed to single-race status. Four new PHA-operated sites were either completely or predominantly one-race projects. Thirty-two PHAs continue to have 100% one-race sites. In addition to the PHAs already mentioned, fourteen continue to operate predominantly one-race sites." *Young v. Pierce*, 685 F. Supp. 975, 978–79 (E.D. Tex. 1988) (citations omitted).

This is not an isolated example. In 1993, the town of Vidor became an all-white enclave when the city's last African-American residents—who were relocated to the area in response to the class-action lawsuit—decided to leave after growing weary of harassment and racial epithets. *See Weary of the Hostility, A City's Blacks Will Go*, N.Y. Times, Aug. 29, 1993, § 1, at 24. As a result, HUD assumed control of the Orange County Housing Authority in Vidor, the first time HUD had ever taken over a housing authority based on civil rights violations. *See Texas Project Is Seized After HUD Finds Bias*, N.Y. Times, Sept. 15, 1993, at A20. In 2000, HUD was again forced to assume control of a local public housing authority, this time in Beaumont, citing a demonstrated pattern of racial discrimination dating back to the 1960s. *See* Ross E. Miloy, *HUD Takes Over Agency in East Texas, Citing Bias*, N.Y. Times, Oct. 4, 2000, at A22. Explaining HUD's decision, Housing Secre-

tary Andrew Cuomo stated, "There's no question as to the existence of discrimination, there's no question that it's been going on for decades. The only question is, when do you say, 'Enough is enough?'" *Id.*

Nor is housing discrimination in Texas limited to its public housing authorities. Zoning ordinances historically relegated minority residents to less desirable neighborhoods. *See, e.g., Liberty Annex Corp. v. City of Dallas*, 289 S.W. 1067, 1067 (Tex. Civ. App. 1926) (finding unconstitutional a Dallas ordinance that relegated residences of "the colored race" to certain areas of town), *aff'd*, 295 S.W. 591, 592 (Tex. Com. App. 1927). The practice continues, albeit less blatantly, today. For example, 2003 amendments to the zoning and subdivision ordinances in Kyle, Texas, require that all new single-family construction meet certain heightened standards for garage size, overall square footage, type of exterior, and lot size. *See NAACP v. City of Kyle*, No. A-05-CA-979 LY, 2006 WL 1751767, at *1 (W.D. Tex. June 16, 2006). The NAACP, joined by several other organizations, brought suit under the Fair Housing Act, alleging that the city's ordinances had the effect of raising the average cost of a starter home by 38%, thereby excluding minorities from being able to live in the city. *Id.* The pleadings survived a motion to dismiss, and the case is currently pending. *Id.* at *5.

D. Discriminatory Law Enforcement Remains A Problem In Texas

The notorious events in Tulia ten years ago provide a potent reminder that minority Texans remain strikingly vulnerable to the frightening prospect of the racially motivated abuse of police and prosecutorial power. In 1999, forty-six African-Americans (nearly 10% of Tulia's African-American residents)

were arrested on drug-related charges based solely on the fabricated testimony of a white deputy sheriff who had purportedly conducted an undercover investigation. *See Coleman v. Texas*, 246 S.W.3d 76, 80 (Tex. Crim. App. 2008). Notwithstanding the complete absence of physical or wiretap evidence against the suspects, all but eight of those arrested were convicted, through either guilty pleas or jury verdicts. *Id.* Many were sentenced to more than 90 years in prison. *Id. See also* Bob Herbert, *Kafka in Tulia*, N.Y. Times, July 29, 2002, at A19.

Public outcry led to intense national scrutiny of the events in Tulia, including a documentary film detailing the miscarriage of justice. *See* Tulia, Texas Documentary Website, *at* http://www.tuliatexasfilm.com/ (last visited Mar. 23, 2009). In 2003, Governor Perry granted pardons to all 35 remaining Tulia defendants. *See* Press Release, Office of Governor Rick Perry, *Gov. Perry Grants Pardons to 35 Tulia Defendants* (Aug. 22, 2003). The governor determined that "a review by the trial court concluded that the key witness in the Tulia cases, an undercover agent, was not credible and withheld important evidence from the defense." *Id.* Several years later, the deputy sheriff was convicted of aggravated perjury for his testimony in the joint evidentiary hearing regarding the habeas petitions of several of the original defendants. *See Coleman*, 246 S.W.3d at 79.

Stories of discrimination by local law enforcement in Texas continue to make national news. Minority residents of Tenaha, Texas, have filed a class-action lawsuit alleging that local officials have unconstitutionally perverted the Texas asset-forfeiture law's intent by targeting minority residents and funding local law enforcement with the proceeds from seized

assets. *See* Plaintiffs' First Am. Compl., *Morrow v. City of Tenaha Deputy City Marshall Barry Washington*, No. 2:08-CV-288 (E.D. Tex. filed Nov. 3, 2008); *see also* Howard Witt, *Highway Robbery? Texas Police Seize Black Motorists' Cash, Cars*, Chi. Trib., Mar. 10, 2009, at 4. The complaint alleges that local law-enforcement officers have threatened motorists with prosecution to induce them to sign over the possessions they have with them—sometimes even their cars. More than 140 motorists in Tenaha agreed to surrender possessions after being threatened with prosecution—in one case police even threatened to seize children and place them in foster care—between June 2006 and 2008. In response to these claims, the Texas Legislature has proposed changes to the asset-forfeiture law requiring more accountability and oversight in the seizing of assets. *See* S.B. 1529, 81st Leg., Reg. Sess. (Tex. 2009).

Although extraordinary, the events in Tulia and Tenaha are not isolated. Since the Tulia raid, other Texas law-enforcement efforts have failed under similar circumstances. *See* Ross E. Miloy, *Arrests by Drug Task Force in Texas Come Under Fire*, N.Y. Times, Apr. 4, 2001, at A14 (discussing a state prosecutor's dismissal of charges against seventeen African-Americans after the single informant responsible for most of the arrests failed several polygraph tests). Residents of South Texas claim that Hispanic minorities driving near the Mexican border have been the targets of stops and seizures similar to those occurring in Tenaha. Media reports suggest that local law-enforcement offices in the Rio Grande Valley have come to rely on money from the raids for funding, and officers therefore target motorists carrying money into Mexico, rather than motorists who might

be carrying drugs into the United States. *See* Lisa Sandberg, *Property Seizures Seen as Piracy*, San Antonio Express-News, Feb. 7, 2009, at A1.

These incidents of discrimination are especially problematic in light of the localized control over law enforcement. When pockets of such discrimination persist in communities, the effects can be pervasive.

E. Racially Motivated Violent Crime Persists In Texas

Vigilante racial violence in Texas's history is well documented. *See generally* John R. Ross, *Lynching*, The Handbook of Texas Online, *at* http://www.tshaonline.org/handbook/online/articles/LL/jgl1.html (last visited Mar. 23, 2009) (noting that Texas stands third among the states, after Mississippi and Georgia, with a total of 468 documented lynchings, the last occurring as recently as 1942). One of the most gruesome examples of hate-based violence in Texas, however, took place not during the 1930s or 1940s, but just over a decade ago when James Byrd, Jr. was dragged to his death behind a pickup truck driven by three white supremacists. *See* Carol Marie Cropper, *Black Man Fatally Dragged in Possible Racial Killing*, N.Y. Times, June 10, 1998, at A16.

Although Byrd's brutal murder was an isolated instance of extreme racial animosity, current events frequently stir memories and renew racial tensions. In September 2008, Brandon McClelland was killed when his skull was crushed and he was dragged 40 feet beneath a pick-up truck in Paris, Texas. *See* James C. McKliney, Jr., *Killing Stirs Racial Unease in Texas*, N.Y. Times, Feb. 14, 2009, at A22. Because the suspects in that case were friends with the victim, police do not believe that the crime was racially motivated. Nonetheless, the murder's gruesome imagery

has served as the catalyst for complaints of systemic racial discrimination from Paris's minority residents. *Id.* For example, Shaquanda Cotton, a 14-year-old African-American, was sentenced to seven months in a state juvenile correction facility for pushing a hall monitor at school. Three months earlier, the same judge had sentenced a 14-year-old white girl to probation for burning down her family's house. *Id.* Racial discontent in Paris has escalated to the point that the DOJ recently sent Community Relations Service (CRS) moderators to the town. *Id.* The CRS was created by the Civil Rights Act of 1964 to serve as the DOJ's "'peacemaker' for community conflicts and tensions arising from differences of race, color, and national origin." U.S. Dep't of Justice, *USDOJ: Community Relations Service*, *at* http://www.usdoj.gov/crs/ (last visited Mar. 23, 2009).

III. CONTINUED COVERAGE OF THE VOTING RIGHTS ACT—ESPECIALLY OVER SPECIAL PURPOSE DISTRICTS—IS ESSENTIAL TO ENSURING THAT MINORITY TEXANS CAN PARTICIPATE MEANINGFULLY IN LOCAL GOVERNANCE

Given the vast powers that special purpose districts may exercise in Texas, the ease with which such districts can be created, and their ability to expand their authority and covered population over time (*see supra* part I), the potential for these districts to bail out of the VRA raises special concerns.

The saga of the Roberts County Fresh Water Supply Company provides a clear illustration of the ease with which special purpose districts may form and accrete substantial power, as well as the potential implications for minority voting rights and the importance of ongoing federal supervision pursuant

to the VRA. In 2007, well-known businessman T. Boone Pickens arranged for one of his employees and the employee's wife to move onto several acres of Pickens's land to initiate the petition process required to create the Roberts County Fresh Water Supply District (RCFWSD). The eventual goal of this district was to pipe water from the Ogallala Aquifer some 200 miles from rural West Texas to Dallas. *See Roberts County Fresh Water Supply District created*, The Cross Section (The High Plains Underground Water Conservation Dist. No. 1, Lubbock, Texas), Nov. 2007, at 4; Berfield, *supra*, at 44-45. While the district was being created, the Texas Legislature enacted two statutes that were crucial to the success of Pickens's venture: one that expanded the eminent domain powers of groundwater conservation districts outside their boundaries, and one that permitted property owners within a district (rather than just resident voters) to serve on the district's board of directors. *See* Berfield, *supra*, at 44-45. With the passage of this legislation, the eight-acre district, created on a 2-0 vote and headed by a five-member board composed entirely of Pickens's employees, soon became a fully fledged groundwater conservation district—complete with the power to exercise eminent domain over the proposed pipeline's right of way (including land outside the district's boundaries) and to issue up to $101 million in bonds to finance its activities. *Id.* The DOJ, however, has entered an objection to the legislation that changed the criterion for board membership, because the state failed to demonstrate that the change would not have a retrogressive effect on minority voting rights. *See* Letter from Grace Chung Becker, Acting Assistant Attorney General, Civil Rights Division, DOJ, to Phil Wilson, Texas Secretary of State (Aug. 21, 2008).

While the RCFWSD acted swiftly to accumulate power and restructure its governing board, other special purpose districts may do so more slowly. If these districts are permitted to bail out of the VRA after ten years of relative inactivity, they may then change essential character in a way that permits discrimination. The Garland ISD is an example of the dangers this could present. Garland ISD is now the twelfth-largest ISD in the state and has an enrollment of more than 57,000 students. Garland ISD—along with eight other ISDs in Texas—remains under a federal court order to desegregate and continues to operate a school-choice plan designed to comply with a decision finding its enrollment practices discriminatory. The district was formed in 1901, just after the 1900 census had counted 809 residents in the town of Garland. Ten years later, Garland's population had fallen to 804. By the time it began court-mandated desegregation, however—69 years after the Garland ISD's tenth birthday—81,437 people lived in Garland. Just as the Garland ISD's record for running elections fairly could not have been evaluated ten years after its creation, it makes little sense to apply a ten-year bail-out provision to special purpose districts that can remain essentially dormant for their first ten years and then acquire extensive regulatory powers and substantial populations, while remaining exempt from federal oversight of their election processes.

The Garland ISD is hardly unique. Many of Texas's special purpose districts are created to serve small populations with the understanding that they may (or even the expectation that they will) eventually grow much larger. Dozens of suburban ISDs in Texas currently serve only a few thousand residents

but have the potential to become large school districts as demographics change during the next ten to twenty years. *See, e.g.*, Lindsay Kastner, *Suburban Schools: Big Growth: No End Soon to Soaring Enrollments*, San Antonio Express-News, May 25, 2008, at 1B (reporting on burgeoning growth in suburban school districts near San Antonio). Nor is the phenomenon limited to school districts. As this case readily demonstrates, MUDs often are established to cover planned residential developments well before a permanent population of any kind is in place.

It makes little sense to permit these districts to bail out of Section 5 coverage after ten or more years of operation serving a small, homogeneous population. The potential for districts to begin as small, homogeneous limited purpose entities and transform into large, diverse, powerful local governments renders a ten-year history of non-discrimination by entities such as the Northwest Austin Municipal Utility District No. 1 irrelevant to concerns about minority disenfranchisement in the future. Indeed, the fact that special purpose districts can and do change so dramatically over time validates Congress's decision to limit the bail-out provision to larger, more stable, political subdivisions such as cities and counties. Special purpose districts should not be permitted to bail out of the Section 5 provisions that have successfully shielded so many minority Texans from electoral misconduct in the past.

CONCLUSION

The judgment of the three-judge district court should be affirmed.

Respectfully submitted,

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March 25, 2009

APPENDIX

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AMICUS CURIAE BRIEF

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No. 08-322

Supreme Court, U.S.
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In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, et al.,

Appellees.

**On Appeal From The
United States District Court
For The District Of Columbia**

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

This amicus curiae brief is presented on behalf of Mountain States Legal Foundation, a nonprofit, public-interest law firm, in support of the Appellant, Northwest Austin Municipal Utility District Number One, and its Jurisdictional Statement.[1]

INTEREST OF AMICUS CURIAE

Mountain States Legal Foundation (MSLF) is a nonprofit, public-interest law firm with 36,000 members. Among other things, MSLF and its members are dedicated to limited and ethical government, litigating in opposition to intrusive, improper, illegal, or unconstitutional legislation that infringes on the rights of individuals or unnecessarily intrudes on the sovereignty of the States, such as Section 5 of the Voting Rights Act.[2]

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief; all counsel have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] 42 U.S.C. § 1973c.

MSLF believes strongly that the Founders created a federal republic, in which the federal government is one of limited, enumerated powers, and that federalism is at the heart of the U.S. Constitution: "The powers delegated by the . . . Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."[3]

MSLF has been active in litigating in opposition to legislation that violates the concept of federalism, and in cases in which the federal government acts beyond its powers. In fact, MSLF has opposed the constitutionality of Section 2 of the Voting Rights Act in three previous cases.[4]

Accordingly, MSLF brings a distinctive point of view to this case and is qualified, given its appearance before this Court in *Adarand Constructors v. Peña*,[5] to assist this Court in its decision.

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[3] The Federalist No. 45 (James Madison) (Jacob E. Cooke ed., 1961).

[4] *U.S. v. Blaine County, Montana*, 363 F.3d 897 (9th Cir. 2004); *U.S. v. Alamosa County, Colo.*, 306 F.Supp.2d 1016 (D.Colo. 2004); *Large v. Fremont County, Wyoming*, No. 05-270J (D.Wyo. filed Oct. 20, 2005, decision pending).

[5] 515 U.S. 200 (1995).

ARGUMENT SUPPORTING PROBABLE JURISDICTION

This Court should note probable jurisdiction to correct the serious and far-reaching constitutional error of the district court panel, which held the scope of congressional power under the Fifteenth Amendment's Enforcement Clause[6] substantially exceeds that authority under the corresponding clause of the Fourteenth Amendment.[7]

The panel held that the congruency and proportionality test, set forth in *City of Boerne v. Flores*,[8] and cases following it, does not apply to Section 2 of the Fifteenth Amendment, holding instead that legislation enacted to enforce Section 2 of the Fifteenth Amendment need only be rational, not congruent and proportionate. The panel relied on *State of South Carolina v. Katzenbach*[9] and the pre-*Boerne* cases following it. In doing so, the panel compounded its error by misinterpreting and eviscerating the holding of *Katzenbach*, which is entirely consistent with *Boerne*.

The consequence is that the panel allows Congress to substantively define the Fifteenth Amendment, a function that is constitutionally entrusted to the judicial branch exclusively. As a result, the panel

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[6] U.S. Const. amend. XV, sec. 2.

[7] U.S. Const. amend. XIV.

[8] 521 U.S. 507 (1997).

[9] 383 U.S. 301 (1966).

incorrectly held that the 2006 reauthorization of Section 5 of the Voting Rights Act was constitutional when it is not.

I. CONGRESS'S POWER UNDER THE ENFORCEMENT CLAUSES OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS IS REMEDIAL, NOT SUBSTANTIVE.

A. CONGRESS MAY NOT DEFINE THE SUBSTANCE OF THE PROHIBITIONS IT ENFORCES.

Unlike the substantive powers conferred by Article I, which bestow on Congress the power to define the scope of substantive rights,[10] the Enforcement Clauses of the Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments[11] are remedial, empowering Congress only to enforce the substantive right, whatever it is, not to define it: "Congress's power under §5, however, extends only to 'enforcing the provisions of the Fourteenth Amendment. The Court has described this power as 'remedial.'"[12] In fact, all the Enforcement Clauses are identical in text and design. That is, each one limits States' powers by prohibiting specific conduct. Consequently, the Enforcement Clauses of those Amendments are remedial, not substantive.

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[10] U.S. Const. art. I, § 8, cl. 18.

[11] U.S. Const. amend. XIII-XV, XIX, XXIV, XXVI.

[12] *Boerne*, 521 U.S. at 519 (citing *Katzenbach* at 326).

Constitutional difficulty arises when Congress forbids conduct that is not unconstitutional facially in order to prevent potentially unconstitutional conduct – so-called prophylactic legislation, such as Section 5 of the Voting Rights Act. Then the question becomes whether Congress has enforced the constitutional prohibition set forth in the Fourteenth Amendment, or whether it has unconstitutionally expanded or defined that prohibition substantively:

> The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.[13]

Indeed, *Boerne* recognized that the "remedial and preventive power of Congress's enforcement power, *and the limitation inherent in the power*, were confirmed in our earliest cases on the Fourteenth Amendment."[14]

B. THE POWER OF CONGRESS TO ENFORCE THE AMENDMENTS DOES NOT DIFFER WITH THE AMENDMENT IT ENFORCES.

Boerne recognized that analysis of any Enforcement Clause power depends, not on the nature of the

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[13] *Id.*

[14] *Id.* at 524 (citing the *Civil Rights Cases*, 109 U.S. 3 (1883)) (emphasis added).

constitutional prohibition it enforces, but rather, on the remedial nature of the Enforcement Clause itself. Referring to *Katzenbach*, *Boerne* recognized that *Katzenbach* sustained the Voting Rights Act of 1965 "under Congress' *parallel power* to enforce the provisions of the Fifteenth Amendment . . . as a measure to combat racial discrimination in voting."[15] Indeed, *Boerne*, viewing the Enforcement Clauses interchangeably, held that under certain circumstances, Congress may sometimes pass prophylactic legislation under its power to "enforce the Fourteenth *and* Fifteenth Amendments. . . ."[16] In doing so, *Boerne* cited interchangeably, as examples, cases approving such legislation under both the Fourteenth and Fifteenth Amendments: *Katzenbach* (Fifteenth), *Katzenbach v. Morgan* (Fourteenth),[17] *Oregon v. Mitchell* (Fourteenth and Fifteenth),[18] and *City of Rome v. United States* (Fifteenth).[19]

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[15] *Boerne*, 521 U.S. 518 (emphasis added); *accord, Lopez v. Monterey County* 525 U.S. 266, 294, n. 6 (1999) ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments are co-extensive); *see also, City of Rome*, 446 U.S. at 207, n. 1 (Rehnquist, J., dissenting) ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as co-extensive.").

[16] *Boerne*, 521 U.S. at 524 (emphasis added).

[17] 384 U.S. 641 (1966).

[18] 400 U.S. 112 (1970).

[19] 446 U.S. 156 (1980).

C. CONGRESSIONAL LEGISLATION UNDER ANY ENFORCEMENT CLAUSE MUST ENFORCE, NOT SUBSTANTIVELY DEFINE, THE AMENDMENT IT ENFORCES.

When Congress passes prophylactic Enforcement Clause legislation, the issue a court must determine is whether that legislation is remedial or unconstitutionally crosses over into substantive legislation:

> Congress does not enforce [any] constitutional right by changing what the right is . . . [because] [i]t has been given [only] the power "to enforce," not the power to determine what constitutes a constitutional violation." . . . Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense "the provisions of [Fourteenth Amendment]."[20]

Boerne then sets out the test to determine whether a remedial statute has unconstitutionally crossed over into the substantive sphere:

> [T]he line between measures that remedy or prevent unconstitutional actions, and measures that make a substantive change in the governing law, is not easy to discern. . . . [Therefore,] [t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means

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[20] *Boerne*, 521 U.S. at 524.

> adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.[21]

Thus, it is plain that the unconstitutional conduct addressed by the Amendment that an Enforcement Clause enforces is irrelevant. Therefore, legislation that seeks to enforce them must be "congruent and proportionate" to the constitutional harm addressed, irrespective of what that particular harm is.

It stretches credulity to suppose that Congress's power to pass prophylactic legislation under any Enforcement Clause depends not on the nature of the power itself but, instead, on the nature of the constitutional prohibition that it enforces. One cannot square this proposition with the plain language of *Boerne*. The district court panel justifies its decision by remarking that *Boerne* and the cases following it dealt with the Fourteenth Amendment only. That is true. But not all the cases on which the panel relied involve the Fifteenth Amendment. In fact, some deal with the Thirteenth and Fourteenth Amendments as well, viewing the Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments as interchangeable. And this rationalization ignores the fact that *Boerne* itself viewed the Enforcement Clauses as "parallel" powers, and relied for its analysis not only Fourteenth Amendment cases, but also on

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[21] *Id.* at 519-20.

Fifteenth and Thirteenth Amendment cases interchangeably.

Therefore, the panel mistakenly held *Boerne* and the post-*Boerne* line of cases irrelevant, holding itself bound only by earlier cases. Regrettably, the panel compounded its error by incorrectly interpreting those cases to be inconsistent with *Boerne*, which they are not. As a result, the panel effectively held that that there is no limit on congressional enforcement power under the Fifteenth Amendment and that Section 2 of the Fifteenth Amendment gives Congress power to define and to determine what constitutes a constitutional violation under the Fifteenth Amendment.

This Court should note probable jurisdiction to correct this critical error and evaluate the constitutionality of Section 5 of the Voting Rights Act, as reauthorized in 2006, under this Court's congruency and proportionality jurisprudence, holding that it fails that test.

II. *KATZENBACH* AND *BOERNE* ARE CONSISTENT, BOTH BEING PART OF A CONTINUUM BY WHICH THIS COURT HAS REFINED ITS VIEW OF CONGRESSIONAL POWER.

A. THE PANEL MISCONSTRUED *KATZENBACH* BECAUSE IT FAILED TO RECOGNIZE THE DIFFERENCE BETWEEN CONGRESS'S SUBSTANTIVE POWERS AND ITS REMEDIAL POWERS.

Because the district court panel failed to distinguish between Congress's substantive powers and its remedial powers, it wrongly concluded that *Katzenbach* and *Boerne* are inconsistent, establishing two different standards of judicial review of congressional power – one for enforcement of the Fourteenth Amendment and one for enforcement of the Fifteenth Amendment. Moreover, the panel concluded that the Fifteenth Amendment standard is very lenient, effectively giving Congress substantive power, whereas the Fourteenth Amendment's standard does not.

The panel, though purportedly focusing on *Katzenbach*, ignored its factual findings and, instead, relied on *Katzenbach*'s use of *McCulloch v. Maryland*[22] and *Ex Parte Virginia*.[23] But these cases are

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[22] 17 U.S. 316 (1819).

[23] 100 U.S. 339 (1879).

consistent with, and support, *Boerne*. First, *Katzenbach* recognized that "[t]he basic test to be applied in a case involving Section 2 of the Fifteenth Amendment is the same as in *all cases concerning the express powers of Congress* with relation to the reserved rights of the States."[24] This requires that all the Enforcement Clauses be subject to the same standard of review. Then, *Katzenbach* relied on *McCulloch*, a case construing whether Congress had the power to establish a national bank under the Necessary and Proper Clause,[25] as establishing the general rule of law for all powers of Congress, including those contained in the Enforcement Clauses:[26]

> Let the end be *legitimate*, let it be *within the scope of the constitution*, and all means which are appropriate, which are *plainly adapted to that end*, which are *not prohibited*, but *consist with the letter and spirit of the constitution*, are constitutional.[27]

The emphasis added in the text is important, because if one understands the difference between substantive powers, at issue in *McCulloch*, and remedial powers, at issue here, then one understands that *McCulloch*'s statement is consistent with *Boerne*. This is evident from examining the qualifying language

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[24] *Katzenbach*, 383 U.S. at 326 (emphasis added).

[25] U.S. Const. art. I, § 8, cl. 18.

[26] *Id.*

[27] *McCulloch*, 17 U.S. at 421 (emphasis added).

emphasized. That is, what is "legitimate," "within the scope of the constitution," "appropriate," "plainly adapted to [a legitimate end]," "not prohibited," and "within the spirit of the constitution" differs for substantive powers and remedial powers, as recognized in *Boerne*. That is, what is "necessary and proper" differs for substantive and remedial legislation, particularly prophylactic legislation. But the panel failed to apprehend this distinction, which is critical to any constitutional analysis of the powers contained in the Enforcement Clauses.

The panel also focused on *Katzenbach*'s reliance on *Ex Parte Virginia*, a Thirteenth and Fourteenth Amendment enforcement case that involved a *non-prophylactic* statute penalizing a judge who disqualified jurors on account of their race. There, the issue was whether Congress had power under the Thirteenth and Fourteenth Amendments to enact that statute. Following its reference to *McCulloch*, *Katzenbach* then recognized that the "Court has subsequently echoed [*McCulloch's*] language in describing *each* of the Civil War Amendments,"[28] citing the following language from *Ex Parte Virginia*:

> Whatever legislation is *appropriate*, that is *adapted to carry out the objects the amendment have in view*, whatever tends to enforce submission *to the prohibition they contain*, and to secure to all persons the enjoyment of

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[28] *Katzenbach*, 383 U.S. at 301 (emphasis added).

> perfect equality of civil rights and the equal protection of the laws *against State denial or invasion, if not prohibited,* is brought within the domain of Congressional power.[29]

This too is consistent with *McCulloch* and *Boerne*. It merely holds that any remedial legislation, whether prophylactic or not, must be "appropriate," and must be "adapted to carry out the objects" of the "State denial or invasion" of the constitutional rights it enforces, and must not be "prohibited" by constitutional considerations. This is certainly consistent with requiring that remedial prophylactic legislation be congruent and proportionate to the constitutional prohibition it enforces, so that it does not exceed its remedial nature and become substantive, as required by *Boerne*.

Consequently, contrary to the panel's view, *Ex Parte Virginia* is consistent with the holding of *Boerne*. In fact, *Ex Parte Virginia* is relied on and cited with approval by *Boerne*.[30] But *Boerne*, unlike the panel, properly recognizes the difference between exercising non-prophylactic remedial powers to enforce an Amendment, at issue in *Ex Parte Virginia*, and exercising those powers to enact prophylactic legislation, at issue in both *Katzenbach* and *Boerne*, which held that: "[i]t is also true, however, that as broad '[a]s the congressional enforcement power is, it

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[29] *Ex Parte Virginia*, 100 U.S. at 345-46 (emphasis added).

[30] *Boerne*, 521 U.S. at 517-18.

is not unlimited.' *Oregon v. Mitchell*, *supra*."[31] Thus, *Boerne* properly recognized that the Constitution requires that the Court must determine that the legislation is, in fact, enforcement of, and not a substantive definition of, the constitutional prohibition set forth in the Amendment, when considering the scope of remedial power to enforce constitutional prohibitions against State action.

Likewise, the panel mistakenly held that *Morgan*, *Mitchell*, and *City of Rome* are all inconsistent with *Boerne*. The panel is wrong once again due to its failure to distinguish between substantive and remedial powers, particularly in the context of remedial prophylactic legislation. Not surprisingly, *Boerne* cites to all three with approval, as does *Katzenbach*, on which *Boerne* bases its congruency and proportionality test.[32] Indeed, the lesson here is that, although the Necessary and Proper Clause[33] applies to all Congressional powers, what is necessary and proper legislation under Congress's substantive powers is not necessary and proper legislation when Congress attempts to exercise its remedial powers by enacting prophylactic legislation. These latter powers are more limited in scope.

What one observes here is the systematic progression and development of this Court's refinement

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[31] *Id.* at 519-19 (emphasis added).

[32] *Id.*

[33] U.S. Const. art. I, § 8, cl. 18.

of its understanding of Congress's limited powers as applied to the States. Thus, there is a steady progression from *McCulloch* to *Boerne* and to the post-*Boerne* cases. The earlier cases, on which the panel relies, are consistent with the later cases and are part of the continuum of the constitutional understanding of this Court. The panel gravely erred in not recognizing this.

B. *KATZENBACH*'S FINDINGS AND HOLDING SERVE AS THE MODEL FOR *BOERNE*'S CONGRUENCY AND PROPORTIONALITY TEST.

Boerne quoted extensively from *Katzenbach* to demonstrate when prophylactic legislation is congruent and proportionate. Far from employing a relaxed standard of review, *Katzenbach* employed a rigorous test to determine whether the factual predicate of intentional, unconstitutional actions by State actors to deny African Americans the right to vote was established, and whether the remedy adopted by Congress to fight this rampant unconstitutional discrimination was both congruent and proportionate to those violations.

Katzenbach recognized that Section 5 of the Voting Rights Act was "an *uncommon exercise of congressional power*," and that "*exceptional* conditions can justify legislative measures *not otherwise appropriate*."[34] The Court then set forth why exceptional

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[34] *Katzenbach*, 383 U.S. at 334 (emphasis added).

conditions justifying measures otherwise inappropriate were proper under the unique circumstances presented to Congress:

> States covered by the Act resorted to the *extraordinary* stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the *face of adverse federal court decrees*. Congress had reason to suppose that these *States might try similar maneuvers in the future* in order to evade the remedies for voting discrimination contained in the Act itself.[35]

Therefore, the Court concluded that, "under the compulsion of these *unique circumstances*, Congress responded in a permissibly decisive manner."[36]

Katzenbach held that the evidence before Congress – of persistent, pervasive, and intransigent State action, intentionally denying the right to vote of African Americans – was sufficient to justify the extraordinary exercise of remedial powers:

> Two points emerge vividly from the voluminous legislative history. . . . First: Congress felt itself confronted by an *insidious and pervasive evil* which had been *perpetuated* in certain parts of our country through the *unremitting and ingenious defiance of the Constitution*. Second: Congress had concluded

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[35] *Id.* at 335 (emphasis added).

[36] *Id.* (emphasis added).

> that the *unsuccessful remedies which it had prescribed in the past* would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.[37]

Additionally, *Katzenbach* held that such discrimination was "pursuant to a widespread pattern or practice" and that "Congress had found that case-by-case litigation was inadequate to combat *widespread and persistent discrimination* in voting."[38]

Thus, *Katzenbach* found that the extraordinary and uncommon exercise of congressional power was constitutional because it was in response to a widespread pattern or practice of insidious and pervasive, unremitting, and ingenious defiance of the Constitution, which frustrated many conventional remedies tried for many years. In the language of *Boerne*, the remedy adopted was congruent and proportionate to the nature and scope of the unconstitutional acts Congress sought to remedy.

Boerne recognized that *Katzenbach* had emphasized that "'the constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience it reflects.'"[39] Indeed, *Boerne* noted that *Katzenbach*

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[37] *Id.* at 309 (emphasis added).

[38] *Id.* at 328 (emphasis added).

[39] *Boerne*, 521 U.S. at 525, quoting *Katzenbach*, 383 U.S. at 308.

approved the severe and intrusive remedies "necessary to 'banish the blight of racial discrimination in voting which has infected the electoral process in parts of our country for nearly a century.'"[40] Additionally, *Boerne* found that *Katzenbach* approved these drastic remedies due, in part, to "evidence in the record reflecting the *subsisting* and *pervasive* discriminatory . . . use of literacy tests."[41] *Boerne* emphasized, referring to *Katzenbach*, that "the new *unprecedented remedies* were deemed necessary given the infectiveness of the existing voting rights law. . . ."[42]

Thus, far from announcing a new test for the Fourteenth Amendment, *Boerne* relied in considerable part on *Katzenbach*, a Fifteenth Amendment case, in demonstrating the constitutional predicate necessary for a congruent and proportionate response to constitutional violations of *any* of the Reconstruction Era Amendments. *Boerne* also relied on *Mitchell*, noting that the Court there "acknowledged the necessity of using strong remedial and preventive measures to respond to the *widespread and persisting deprivations of constitutional rights*. . . ."[43]

The panel ignored these factual findings by Congress of "exceptional" and "unique" conditions

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[40] *Id.* at 525, quoting *Katzenbach*, 383 U.S. at 308.

[41] *Id.* at 525 (emphasis added).

[42] *Id.* at 526 (emphasis added).

[43] *Id.* (emphasis added).

upon which *Katzenbach* justified Section 5's "uncommon exercise of congressional power." Instead, the panel focused on one sentence in *Katzenbach*: "As against the reserved powers of the States, Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting."[44] Unfortunately, the panel ignored the very next sentence: "We turn now to a more detailed description of the standards which govern our review of the Act."[45] *Katzenbach* then detailed the egregious record of unremitting, widespread patterns and practices of ingenious defiance of the Constitution, which were impervious to ordinary remedies, that justified the extraordinary remedy adopted. Only under these circumstances did *Katzenbach* find that the extraordinary remedies were "reasonable." Ignoring the actual holding of *Katzenbach*, the panel cobbled together its own, newly minted "rational basis" theory of constitutional power when enforcing the Fifteenth Amendment, in direct contrast to and in conflict with the congruency and proportionality test of *Boerne*.

Thus, the panel's failure to recognize the distinction between Congress's substantive and remedial powers, and its understanding of neither *Katzenbach* nor *Boerne*, resulted in it applying a highly lenient standard of judicial review by which it found Section 5 of the Voting Rights Act constitutional, when, under

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[44] *Katzenbach*, 383 U.S. 324 (emphasis added).

[45] *Id.*

the proper constitutional analysis, it should have held Section 5 to be unconstitutional. This Court should note probable jurisdiction and rectify this clear error of the district court panel.

CONCLUSION

This Court's thorough and thoughtful test for determining the constitutionality of legislation enacted by Congress pursuant its remedial Enforcement Clauses powers found in *Boerne* and the cases that followed must not be ignored as the district court panel did here. Therefore, this Court should note probable jurisdiction to correct the serious and far-reaching constitutional error of the district court panel.

Submitted October 10, 2008.

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AMICUS CURIAE BRIEF

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In The

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

1. Whether Section 4(a) of the Voting Rights Act, 42 U.S.C. § 1973b, which permits "political subdivisions" of a State covered by the requirement of Section 5, 42 U.S.C. § 1973c, that certain jurisdictions preclear changes affecting voting with the federal government to bail out of Section 5 coverage if they can establish a 10-year history of compliance with the Voting Rights Act, must be available to any political subunit of a covered State when the Court's precedent requires "political subdivision" to be given its ordinary meaning throughout most of the Voting Rights Act and no statutory text abrogates that interpretation with respect to Section 4(a).

2. Whether, under the Court's consistent jurisprudence requiring that remedial legislation be congruent and proportional to substantive constitutional guarantees, the 2006 enactment of the Section 5 preclearance requirement can be applied as a valid exercise of Congress's remedial powers under the Reconstruction Amendments when that enactment was founded on a congressional record demonstrating no evidence of a persisting pattern of attempts to evade court enforcement of voting rights guarantees in jurisdictions covered only on the basis of data 35 or more years old, or even when considered under a purportedly less stringent rational-basis standard.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

Mountain States Legal Foundation respectfully submits this amicus curiae brief in support of the Appellant, Northwest Austin Municipal Utility District Number One.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest law firm organized under the laws of the State of Colorado. MSLF and its members strongly believe that the Founders created a federal republic, in which the federal government is one of limited, enumerated powers, and that federalism is at the heart of the U.S. Constitution: "The powers delegated by the . . . Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."[2] Accordingly, since its

[1] Pursuant to Rule 37.3(a), counsel of record states that the parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] The Federalist No. 45 (James Madison) (Jacob E. Cooke ed., 1961).

creation in 1977, MSLF has been active in litigating in opposition to legislation that violates the concept of federalism and in cases in which the federal government acts beyond its powers. Specifically, MSLF has represented clients in opposing intrusive, improper, illegal, or unconstitutional legislation, such as Section 5 of the Voting Rights Act,[3] that infringes on the rights of individuals or unnecessarily intrudes on the sovereignty of the States.

MSLF has been active in litigating in opposition to legislation that violates the concept of federalism and in cases in which the federal government acts beyond its powers. In fact, MSLF has opposed the constitutionality of Section 2 of the Voting Rights Act in three previous cases.[4] Accordingly, MSLF brings a distinctive point of view to this case that may assist this Court in its decision.

ARGUMENT

This Court should reverse the three-judge district court panel, and hold Section 5 of the Voting Rights Act unconstitutional to correct the serious and far-reaching constitutional error of the panel's holding

[3] 42 U.S.C. § 1973c.

[4] *U.S. v. Blaine County Montana*, 363 F.3d 897 (9th Cir. 2004); *U.S. v. Alamosa County Colorado*, 306 F.Supp.2d 1016 (D.Colo. 2004); *Large v. Fremont County Wyoming*, No. 05cv270J (D.Wyo. filed Oct. 20, 2005, decision pending).

that the scope of congressional power under the Fifteenth Amendment's Enforcement Clause[5] is far greater than that under the corresponding clause of the Fourteenth Amendment.[6]

The three-judge district court panel held that the congruency and proportionality test set forth in *City of Boerne v. Flores*[7] and cases following it does not apply to Section 2 of the Fifteenth Amendment, holding instead that legislation enacted to enforce Section 2 of the Fifteenth Amendment need be only rational, not congruent and proportionate.[8] The panel relied on *State of South Carolina v. Katzenbach*[9] and the pre-*Boerne* cases following it and, in doing so, compounded its error by misinterpreting and eviscerating the holding of *Katzenbach*, a holding entirely consistent with *Boerne*.

The consequence is that the panel allows Congress to define the Fifteenth Amendment substantively, a function constitutionally entrusted to the judicial branch exclusively. As a result, the panel incorrectly held that the 2006 reauthorization of Section 5 of the Voting Rights Act is constitutional when it is not.

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[5] U.S. Const. amend. XV, § 2.

[6] U.S. Const. amend. XIV.

[7] 521 U.S. 507 (1997).

[8] *Northwest Austin Mun. Utility Dist. Number One v. Mukasey*, 573 F.Supp.2d 221, 245-46 (D.D.C. 2008).

[9] 383 U.S. 301 (1966).

I. CONGRESS'S POWER UNDER THE ENFORCEMENT CLAUSES OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS IS REMEDIAL, NOT SUBSTANTIVE.

A. Congress May Not Define The Substance Of The Prohibitions It Enforces.

Unlike the substantive powers conferred by Article I, which bestow on Congress the power to define the scope of substantive rights, the Enforcement Clauses of the Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments[10] are remedial, empowering Congress only to enforce a prohibition, not substantively define it.[11] "Congress's power under §5 extends only to 'enforcing' the provisions of the Fourteenth Amendment. This Court has described this power as 'remedial.'"[12]

Constitutional difficulty arises when Congress, exercising its remedial powers, forbids conduct that is facially constitutional in order to prevent *potentially* unconstitutional conduct – so-called "prophylactic legislation," such as Section 5 of the Voting Rights Act. In such a case, the question arises as to whether Congress has enforced the constitutional prohibition

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[10] U.S. Const. amend. XIII-XV, XIX, XXIV, XXVI.

[11] *Boerne*, 521 U.S. at 519.

[12] *Id.* (quoting *Katzenbach*, 383 U.S. at 326).

set forth in the Amendment or whether it has unconstitutionally expanded or defined that prohibition substantively, which it may not:

> The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.[13]

Indeed, *Boerne* recognized that the "remedial and preventive power of Congress' enforcement power, *and the limitation inherent in the power*, were confirmed in our earliest cases on the Fourteenth Amendment."[14]

B. Congress's Enforcement Clause Power Is The Same For Each Amendment It Enforces.

Boerne recognized that analysis of any Enforcement Clause power depends, not on the nature of the constitutional prohibition it enforces but, rather, on the remedial nature of the Enforcement Clause itself.[15] Referring to *Katzenbach*, *Boerne* recognized that *Katzenbach* sustained the Voting Rights Act of 1965 "under Congress' *parallel power* to enforce the provisions of the Fifteenth Amendment . . . as a

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[13] *Id.*

[14] *Id.* at 524 (citing the *Civil Rights Cases*, 109 U.S. 3 (1883)) (emphasis added).

[15] *Boerne*, 521 U.S. at 519.

measure to combat racial discrimination in voting."[16] Indeed, *Boerne*, viewing the Enforcement Clauses interchangeably, held that, under certain circumstances, Congress may sometimes pass prophylactic legislation under its power to "enforce the Fourteenth *and* Fifteenth Amendments. . . ."[17] In doing so, *Boerne* cited as interchangeable examples cases approving such legislation under both the Fourteenth and Fifteenth Amendments, including *Katzenbach*[18] (Fifteenth), *Katzenbach v. Morgan*[19] (Fourteenth), *Oregon v. Mitchell*[20] (Fourteenth and Fifteenth), and *City of Rome v. United States*[21] (Fifteenth).

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[16] *Id.* at 518 (emphasis added); *accord*, *Lopez v. Monterey County*, 525 U.S. 266, 294, n. 6 (1999) ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments are co-extensive); *see also*, *City of Rome*, 446 U.S. at 207, n. 1 (Rehnquist, J., dissenting) ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as co-extensive.").

[17] *Boerne*, 521 U.S. at 524 (emphasis added).

[18] 383 U.S. 301 (1966).

[19] 384 U.S. 641 (1966).

[20] 400 U.S. 112 (1970).

[21] 446 U.S. 156 (1980).

C. Congressional Legislation Under Any Enforcement Clause May Not Define Or Expand The Scope Of The Amendment It Enforces.

When Congress passes prophylactic Enforcement Clause legislation, the issue a court must determine is whether that legislation is remedial or unconstitutionally crosses over into substantive legislation:

> Congress does not enforce [any] constitutional right by changing what the right is . . . [because] [i]t has been given [only] the power "to enforce," not the power to determine what constitutes a constitutional violation. . . . Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense "the provisions of [Fourteenth Amendment]."[22]

Boerne then sets out the test to determine whether a remedial statute unconstitutionally crosses over into the substantive sphere:

> [T]he line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern. . . . [Therefore,] [t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means

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[22] *Boerne*, 521 U.S. at 519 (quoting *Katzenbach*, 383 U.S. at 326).

> adapted to that end. Lacking such a connection, legislation may become substantive in operation and effect.[23]

Thus, it is plain that the remedial amendment that an enforcement clause enforces is irrelevant – each must be congruent and proportionate to the substantive power enforced.

It stretches credulity to suppose that Congress's power to pass prophylactic legislation under any Enforcement Clause depends not on the nature of the power itself but, instead, on the nature of the constitutional prohibition that it enforces. One cannot square this proposition with the plain language of *Boerne*. In the instant case, the district court panel justified its decision by remarking that *Boerne* and the cases following it deal with the Fourteenth Amendment only.[24] That is true. But not all the cases on which the panel relied in distinguishing the Enforcement Clause of the Fifteenth Amendment from that of the Fourteenth Amendment rely only on the Fifteenth Amendment. In fact, some deal with the Thirteenth and Fourteenth Amendments as well, viewing the Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments as interchangeable. *Katzenbach*[25] (Fifteenth), *Katzenbach v.*

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[23] *Id.* at 519-20.

[24] *Northwest Austin*, 573 F.Supp.2d at 245-46.

[25] 383 U.S. 301 (1966).

Morgan[26] (Fourteenth), *Oregon v. Mitchell*[27] (Fourteenth and Fifteenth), and *City of Rome v. United States*[28] (Fifteenth).

Furthermore, the panel's distinction ignores the fact that *Boerne* itself views the Enforcement Clauses as "parallel" powers and relied for its analysis not only on Fourteenth Amendment cases, but also on Fifteenth and on Thirteenth Amendment cases interchangeably.[29]

Therefore, the panel mistakenly held *Boerne* and the post-*Boerne* line of cases irrelevant, holding itself bound only by pre-*Boerne* cases. Regrettably, the panel compounded its error by incorrectly interpreting those earlier cases to be inconsistent with *Boerne*, which they are not. As a result, the panel effectively held that there is no limit on congressional enforcement power under the Fifteenth Amendment and that Section 2 of the Fifteenth Amendment gives Congress power to define and to determine what constitutes a constitutional violation under the Fifteenth Amendment.

Accordingly, this Court should reverse the district court panel, correcting its critical error, and hold Section 5 of the Voting Rights Act, as reauthorized

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[26] 384 U.S. 641 (1966).

[27] 400 U.S. 112 (1970).

[28] 446 U.S. 156 (1980).

[29] *Boerne*, 521 U.S. at 519, 524.

in 2006, unconstitutional under this Court's congruency and proportionality jurisprudence.

II. *KATZENBACH* AND *BOERNE* ARE CONSISTENT, BOTH BEING PART OF A CONTINUUM BY WHICH THIS COURT HAS REFINED ITS VIEW OF CONGRESSIONAL POWER.

A. The Three-Judge Panel Misconstrued *Katzenbach* Because It Failed To Recognize The Difference Between Congress's Substantive Powers And Its Remedial Powers.

Because the district court panel failed to distinguish between Congress's substantive powers and its remedial powers, it wrongly concluded that *Katzenbach* and *Boerne* are inconsistent, establishing two different standards of judicial review of congressional power – one for enforcement of the Fourteenth Amendment and one for enforcement of the Fifteenth Amendment.[30] To make matters worse, the panel concluded that the Fifteenth Amendment standard is very lenient, effectively giving Congress substantive power, which the Fourteenth Amendment standard does not.

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[30] *Northwest Austin*, 573 F.Supp.2d at 245-46.

The panel,[31] though purportedly focusing on *Katzenbach*, ignored that decision's factual findings and instead relied on *Katzenbach*'s reference to *McCulloch v. Maryland*.[32] But the panel ignored the fact that these cases are consistent with, and support, *Boerne*. First, *Katzenbach* recognized that "the basic test to be applied in a case involving [the constitutionality of congressional action pursuant to] §2 of the Fifteenth Amendment is the same as in *all cases concerning the express powers of Congress* with relation to the reserved rights of the States."[33] This holding requires that all the Enforcement Clauses be subject to the same standard of review. Then, *Katzenbach* relied on *McCulloch*, a case construing whether Congress had the power under the Necessary and Proper Clause to establish a national bank, as the general rule of law for all powers of Congress, including those contained in the Enforcement Clauses:[34]

> Let the end be *legitimate*, let it be *within the scope of the constitution*, and all means which are *appropriate*, which are *plainly adapted to that end*, which are *not prohibited*, but *consistent with the letter and spirit of the constitution*, are constitutional.[35]

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[31] *Id.* at 237.

[32] 17 U.S. 316 (1819).

[33] *Katzenbach*, 383 U.S. at 326 (emphasis added).

[34] *Id.*

[35] *McCulloch*, 17 U.S. at 421 (emphasis added).

The emphasis added in the text is important because, if one understands the difference between substantive powers, at issue in *McCulloch*, and remedial powers, at issue here, then one understands that *McCulloch*'s statement is consistent with *Boerne*. This is evident from examining the qualifying language emphasized. That is, what is "legitimate," "within the scope of the constitution," "appropriate," "plainly adapted to [a legitimate end]," "not prohibited," and "within the spirit of the constitution" differs for substantive powers and remedial powers, particularly prophylactic remedial legislation, as recognized in *Boerne*.[36] Unfortunately, the three-judge panel failed to apprehend this important distinction, a distinction critical to any constitutional analysis of the powers contained in the Enforcement Clauses.

The panel also ignored *Katzenbach*'s reliance on *Ex Parte Virginia*,[37] a Thirteenth and Fourteenth Amendment enforcement case that involved a *non-prophylactic* statute penalizing a judge who disqualified jurors on account of their race. In that case, the issue was whether Congress had power under the Thirteenth and Fourteenth Amendments to enact that statute. Following its reference to *McCulloch*, *Katzenbach* then recognized that "the Court has subsequently echoed [*McCulloch*'s] language in

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[36] *Boerne*, 521 U.S. at 524.

[37] 100 U.S. 339 (1879).

describing *each* of the Civil War Amendments,"[38] citing the following language from *Ex Parte Virginia*:

> Whatever legislation is *appropriate*, that is, *adapted to carry out the objects the amendment have in view*, whatever tends to enforce submission *to the prohibitions they contain*, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws *against State denial or invasion, if not prohibited,* is brought within the domain of Congressional power.[39]

This too is consistent with *McCulloch* and *Boerne*. It merely holds that any remedial legislation, whether prophylactic or not, must be "appropriate," must be "adapted to carry out the objects" of the "State denial or invasion" of the constitutional right it enforces, and must not be "prohibited" by other constitutional considerations. But what is appropriate for prohibitory remedial legislation differs from what is appropriate for prophylactic remedial legislation. The latter must be both congruent and proportionate, so that it does not exceed its remedial nature and become substantive.[40]

Consequently, contrary to the panel's view, *Ex Parte Virginia* is consistent with the holding of *Boerne*. In fact, *Boerne* relied on and cited *Ex Parte*

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[38] *Katzenbach*, 383 U.S. at 301 (emphasis added).

[39] *Ex Parte Virginia*, 100 U.S. at 345-46 (emphasis added).

[40] *Boerne*, 521 U.S. at 519-20, 524.

Virginia with approval.[41] But the *Boerne* court, unlike the three-judge panel, properly recognized the difference between exercising non-prophylactic remedial powers to enforce an Amendment, at issue in *Ex Parte Virginia*, and enacting prophylactic legislation, at issue in both *Katzenbach* and *Boerne*. Thus, it properly recognized that the Constitution requires that the Court determine that the prophylactic legislation under Congress's remedial powers is, in fact, enforcement, and not a substantive definition, of the constitutional prohibition.[42]

Similarly, the panel mistakenly held that *Morgan*, *Mitchell*, and *City of Rome* are all inconsistent with *Boerne*.[43] The panel is wrong once again due to its failure to distinguish between substantive and remedial powers, particularly in the context of remedial prophylactic legislation. Not surprisingly, *Boerne* cites to all three with approval, as does *Katzenbach*, on which *Boerne* bases its congruency and proportionality test.[44] Indeed, the lesson here is that, though the Necessary and Proper Clause applies to all Congressional powers, what is necessary and proper under Congress's substantive powers may not be necessary and proper when Congress exercises its remedial powers by enacting prophylactic legislation.

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[41] *Id.* at 517-18.

[42] *Id.* at 519-20, 524.

[43] *Northwest Austin*, 573 F.Supp.2d at 237-39.

[44] *Boerne*, 521 U.S. at 517-18.

That is, what is necessary and proper under these latter powers requires congruency and proportionality.

What one observes through this series of cases is the systematic progression and development of this Court's refinement of its understanding of Congress's limited powers as applied to the States. There is a steady progression from *McCulloch* to *Boerne* and to the post-*Boerne* cases. The pre-*Boerne* cases, on which the panel relied, are consistent with the later cases and are part of the continuum of the constitutional understanding of this Court. The three-judge panel gravely erred in not recognizing this fact.

B. *Katzenbach*'s Findings And Holding Serve As The Model For *Boerne*'s Congruency And Proportionality Test.

Boerne quoted extensively from *Katzenbach* to demonstrate when remedial prophylactic legislation is congruent and proportionate.[45] Far from employing a relaxed standard of review, *Katzenbach* recognized that Section 5 of the Voting Rights Act is "an *uncommon exercise of congressional power*" and that only "*exceptional* conditions can justify legislative measures *not otherwise appropriate*."[46] In *Katzenbach*, this Court then set forth why only exceptional conditions justify measures otherwise appropriate:

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[45] *Id.* at 525.

[46] *Katzenbach*, 383 U.S. at 334 (emphasis added).

> Congress knew that some of the States covered by . . . the Act resorted to the *extraordinary* stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the *face of adverse federal court decrees*. Congress had reason to suppose that these *States might try similar maneuvers in the future* in order to evade the remedies for voting discrimination contained in the Act itself.[47]

Therefore, this Court in *Katzenbach* concluded that, "[u]nder the compulsion of these *unique circumstances*, Congress responded in a permissibly decisive manner."[48] *Katzenbach* held that the evidence before Congress – persistent, pervasive, and intransigent State action to deny the right to vote of African Americans intentionally – was sufficient to justify the extraordinary exercise of remedial powers:

> Two points emerge vividly from the voluminous legislative history. . . . First: Congress felt itself confronted by an *insidious and pervasive evil* which had been *perpetuated* in certain parts of our country through *unremitting and ingenious defiance of the Constitution*. Second: Congress concluded that the *unsuccessful remedies which it had prescribed in the past* would have to be replaced by sterner and more elaborate measures in

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[47] *Id.* at 335 (emphasis added).

[48] *Id.* (emphasis added).

> order to satisfy the clear commands of the Fifteenth Amendment.[49]

Critical to *Katzenbach*'s holding is that such discrimination was "pursuant to a widespread pattern or practice" of unconstitutional voting discrimination and that "case-by-case litigation was inadequate to combat [such] *widespread and persistent discrimination* in voting. . . ."[50]

Thus, *Katzenbach* found that the extraordinary and uncommon exercise of congressional power was constitutional only because it was in response to a widespread pattern or practice of insidious and pervasive, unremitting, and ingenious defiance of the Constitution, which had frustrated many conventional remedies for many years. In the language of *Boerne*, the remedy adopted was congruent and proportionate to the nature and scope of the unconstitutional acts Congress sought to remedy.[51] In other words, *Katzenbach* applied the congruency and proportionality test, though it did not use those terms.

Boerne recognized *Katzenbach*'s insistence that "'the constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience . . . it reflects.'"[52] Indeed, *Boerne* noted that *Katzenbach* approved the

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[49] *Id.* at 309 (emphasis added).

[50] *Id.* at 328 (emphasis added).

[51] *Boerne*, 521 U.S. at 519-20, 524.

[52] *Id.* at 525 (quoting *Katzenbach*, 383 U.S. at 308).

severe and intrusive remedies necessary to "'banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.'"[53] Additionally, *Boerne* found that *Katzenbach* approved these drastic remedies in part due to "evidence in the record reflecting the *subsisting* and *pervasive* discriminatory . . . use of literacy tests."[54] Referring to *Katzenbach*, *Boerne* emphasized, "The new, *unprecedented remedies* were deemed necessary given the ineffectiveness of the existing voting rights laws. . . ."[55]

Thus, far from announcing a new test for exercising remedial, prophylactic enforcement powers under the Fourteenth Amendment, *Boerne* relied heavily on *Katzenbach*, a Fifteenth Amendment case, in demonstrating the constitutional predicate necessary for a congruent and proportionate prophylactic remedy for constitutional violations of *any* of the Reconstruction Era Amendments. *Boerne* also relied on *Mitchell*, noting that the Court there "acknowledge[d] the necessity of using strong remedial and preventive measures to respond to the *widespread and persisting deprivation of constitutional rights*. . . ."[56]

The panel ignored the "exceptional" and "unique" conditions upon which *Katzenbach* upheld Section 5's

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[53] *Id.* (quoting *Katzenbach*, 383 U.S. at 308).

[54] *Id.* (emphasis added).

[55] *Id.* at 526 (emphasis added).

[56] *Id.* (emphasis added).

"uncommon exercise of congressional power." Instead, the panel focused on a single sentence in *Katzenbach*: "As against the reserved powers of the States, Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting."[57] Critically, though, the panel ignored *Katzenbach*'s next sentence: "We turn now to a more detailed description of the standards which govern our review of the Act."[58] *Katzenbach* then detailed the egregious record of unremitting, widespread patterns and practices of ingenious defiance of the Constitution, which were impervious to ordinary remedies, that justified the extraordinary remedy adopted as "rational." Only under these circumstances did *Katzenbach* find that the extraordinary remedies were "rational means." Ignoring the actual holding of *Katzenbach*, the panel cobbled together its own "rational basis" theory of constitutional power when enforcing the Fifteenth Amendment, in direct contrast to and in conflict with the holdings of *Katzenbach* and *Boerne* as set forth above.

Thus, the panel's failure to recognize the distinction between Congress's substantive and remedial powers, particularly prophylactic remedial powers, and its misunderstanding of both *Katzenbach* and *Boerne* resulted in it applying a highly lenient standard of judicial review by which it found Section 5

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[57] *Katzenbach*, 383 U.S. at 324 (emphasis added).

[58] *Id.*

constitutional, when, under the proper constitutional analysis, it should have held Section 5 unconstitutional. This Court should reverse the panel and hold Section 5, as reenacted in 2006, unconstitutional because it exceeds Congress's authority under Section 2 of the Fifteenth Amendment.

CONCLUSION

This Court's thorough and thoughtful test in *Boerne* for determining the constitutionality of legislation enacted by Congress pursuant to its remedial Enforcement Clause powers serves as the basis for this Court's ruling. This Court should reverse the district court panel's decision and hold Section 5 of the Voting Rights Act, as reenacted in 2006, unconstitutional in excess of Congress's powers under Section 2 of the Fifteenth Amendment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-322

In The Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., Attorney General of the United States of America, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICI CURIAE* THE NAVAJO NATION, ANTHONY WOUNDED HEAD, SR., IVAN STARR, OLIVER J. SEMANS, SR., AND DAN MCCOOL, IN SUPPORT OF APPELLEES [IMPACT ON AMERICAN INDIANS]

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus Navajo Nation is a federally recognized Indian tribe and is the largest tribe in the United States, comprising over 250,000 members and occupying approximately 25,000 square miles of trust lands within Arizona, New Mexico, and Utah.[2] The State of Arizona and political subdivisions of the Arizona portion of the Navajo Nation are required to submit voting changes for preclearance under Section 5 of the Voting Rights Act. The Navajo Nation has been involved in a number of voting rights lawsuits to ensure that its members can participate in the electoral process. The Navajo Nation and its members sent letters to Congress in support of the reauthorization of the expiring provisions of the Voting Rights Act.

Amicus Oliver J. Semans, Sr., is a member of the Rosebud Sioux Nation and lives on the Rosebud Sioux Reservation located in Todd County, South Dakota – a jurisdiction subject to Section 5's preclearance

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[1] Counsel of record for the parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no persons or entity, other than *amici curiae* and their counsel, made a financial contribution for the preparation or submission of this brief.

[2] According to the 2000 U.S. Census, approximately 180,000 individuals live on the Navajo Reservation, approximately 97% of whom are American Indian. U.S. Census Bureau, NAVAJO RESERVATION DEMOGRAPHIC PROFILE: 2000, Table DP-1, *available at* http://censtats.census.gov/data/US/502430.pdf.

requirements. Mr. Semans has organized Get Out the Vote Campaigns in South Dakota for tribal voters. Mr. Semans testified at a hearing in Rapid City, South Dakota in support of the reauthorization of the Voting Rights Act. Mr. Semans served as a field director for a nonprofit group focused on Indian voter registration and rights. He has testified extensively before South Dakota State Senate Committees on proposed laws that would adversely affect the voting rights of American Indians. Mr. Semans has continuously worked on increasing voter turnout throughout the State of South Dakota and contributed to the 117% increase in voter participation of Indians during the 2004 elections.

Amici Anthony Wounded Head, Sr. and Ivan Starr are tribal council representatives of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation located in Shannon and Jackson Counties in South Dakota. The Pine Ridge Reservation is one of the poorest areas in the country.[3] Mr. Wounded Head and Mr. Starr are native language speakers and are supportive of language translations for American

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[3] The Pine Ridge Reservation is located in Shannon and Jackson counties. Shannon County has the highest Indian population of any county in the United States at 94.2 percent, and is the "second-poorest county nationwide." The poorest county is in Buffalo County, South Dakota and has an 81.6% Indian population. *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2019 (2006) (appendix to the statement of Wade Henderson).

Indian language speakers during elections. *Amici* have witnessed the impacts of Section 5 in Shannon County for reservation voters.

Amicus Dan McCool is a Professor of Political Science at the University of Utah. Professor McCool's research focuses on water rights and voting rights, and he served as a consultant for the ACLU's Native Vote Project. Professor McCool testified at the National Commission for Voting Rights Hearing held in Rapid City, South Dakota in 2005 providing evidence to support the reauthorization of Section 5 of the Voting Rights Act. He has appeared as an expert witness in several Indian voting rights cases and has written and published extensively on the subject. Professor McCool is a co-author of NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE (2007).

The Navajo Nation, and individuals Semans, Wounded Head, Starr and McCool file this brief as *amici curiae* in support of the right to vote of American Indians, particularly elders and others who continue to live traditional lifestyles in small communities in rural and remote areas where they continue to speak traditional American Indian languages and face the impacts of past discrimination in the areas of health, education, and voting.

Amici agree with Appellees that Congress' 2006 reauthorization of the Voting Rights Act was constitutional. Moreover, *Amici* are concerned that if the Court declares that the reauthorization of Section 5 is

unconstitutional, American Indian voting rights will be significantly impacted and result in a reversal of the strides made in recent years to ensure greater Indian voter participation. This would negatively impact many American Indian voters who only recently secured the right to vote, continue to face discrimination in voting, and who cannot shoulder the financial burden to bring lawsuits under Section 2 of the Voting Rights Act.

ARGUMENT

I. AMERICAN INDIANS HAVE HISTORICALLY BEEN SUBJECT TO PURPOSEFUL DISCRIMINATION THAT HAS DENIED THEIR RIGHT TO VOTE IN STATE AND FEDERAL ELECTIONS.

American Indians "have experienced a long history of disenfranchisement as a matter of law and of practice."[4] It was not until Congress passed the Indian Citizenship Act of 1924 that all American Indians were granted United States citizenship.[5] Prior to 1924, Indians were denied citizenship and the right to vote based on the underlying trust

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[4] *Continuing Need for Section 203's Provision for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 309 (2006) (letter from Joe Garcia, NCAI).

[5] An Act of June 2, 1924, 43 Stat. 253, Pub. L. 175 (1924) (codified as amended at 8 U.S.C. § 1401(b)).

relationship between the federal government and the tribes and on their status as citizens of their tribes. Until the 1924 Indian Citizenship Act, Indians could only become citizens through naturalization "by or under some treaty or statute."[6] Enactment of the 1924 Act ended the period in United States history in which United States citizenship of Indians conditioned on severance of tribal ties and renunciation of tribal citizenship and assimilation into the dominant culture.[7]

By operation of the Fourteenth Amendment, an Indian who is a United States citizen is also a citizen of his or her state of residence.[8] Notwithstanding the passage of the Indian Citizenship Act, states continued to discriminate against Indians by denying them the right to vote in state and federal elections through the use of poll taxes, literacy tests, and intimidation.[9]

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[6] *Elk v. Wilkins*, 112 U.S. 94, 103 (1884).

[7] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 14.01[3], n. 42-44. (2005 Ed.)

[8] U.S. CONST. amend. XIV, § 1.

[9] *Continuing Need for Section 203's Provision for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 309 (2006) (letter from Joe Garcia, NCAI).

A. Arizona Continued to Prevent Indians from Voting Notwithstanding Passage of the Indian Citizenship Act of 1924.

Even after 1924, Arizona Indians were prohibited from participating in elections. The Arizona Supreme Court upheld the prohibition finding that Indians living on reservations could not vote because they were wards of the federal government and, as such were "persons under guardianship" and thereby prohibited from voting in Arizona.[10] Reservation Indians in Arizona did not achieve the right to vote in state elections until 1948 when the Arizona Supreme Court overturned the *Porter v. Hall* decision.[11]

The State of Arizona continued its discrimination through its imposition of English literacy tests which were not repealed until 1972.[12] Only those Indians who could read the United States Constitution in English and write their names were eligible to vote in state elections. The enactment of the Voting Rights Act in 1965 included a temporary prohibition of literacy tests in covered jurisdictions. Apache County,

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[10] *Porter v. Hall*, 34 Ariz. 308, 331-332, 271 P. 411, 419 (Ariz. 1928).

[11] *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (Ariz. 1948) (holding that Indians living on Indian reservations should in all respects be allowed the right to vote).

[12] *See* ARIZ. REV. STAT. ANN. § 16-101(A)(4)-(5) (1956); *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1372 (2006) (appendix to the statement of Wade Henderson).

Arizona was included in the original list of jurisdictions covered by Section 5 of the Voting Rights Act.[13] On November 19, 1965, Navajo and Coconino Counties also became covered by Section 5.[14] As a result of this coverage, the Arizona literacy tests were suspended in each of these three counties. In 1966, these three counties became the first jurisdictions to successfully bail out from coverage under Section 5 after the U.S. District Court for the District of Columbia held that Arizona's literacy test had not been discriminatorily applied against Indians in the preceding five years.[15]

When the Voting Rights Act was amended in 1970, it included a nationwide ban on literacy tests, which again preempted the operation of Arizona's literacy tests.[16] Arizona became one of the states to unsuccessfully challenge the ban on literacy tests. In upholding the ban and striking down literacy tests, the Supreme Court noted that Arizona had "a serious problem of deficient voter registration among

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[13] Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965).

[14] Determination of the Director Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965, 30 Fed. Reg. 14505 (Nov. 19, 1965).

[15] *Apache County v. United States*, 256 F. Supp. 903, 910-911 (D.D.C. 1966).

[16] The Voting Rights Act, 42 U.S.C. § 1973aa (1970) (current version at 42 U.S.C. § 1973b (2008)).

Indians."[17] The Court recognized that non-English speakers may make use of resources in their native languages in order to responsibly and knowledgeably cast a ballot.[18]

The Voting Rights Act amendments of 1970 included, as one of the measures of voting discrimination, registration and turnout in the 1968 presidential election. As a result, Apache, Coconino and Navajo Counties again became covered by Section 5 along with five (5) other Arizona counties.

Even after 1970, there were a number of challenges to Indians' right to vote and to hold office. Many of these cases challenged activities in Apache County, one of only a few counties within the United States in which the predominant languages spoken are American Indian. Of these languages, the most commonly used is Navajo, a historically unwritten language.[19] The Arizona Supreme Court quashed a permanent injunction by the lower court against the seating of Tom Shirley, a Navajo Indian living on the

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[17] *Oregon v. Mitchell*, 400 U.S. 112, 117, 132, 153 (1970).

[18] 400 U.S. at 146.

[19] Considering the Navajo Reservation as a whole, including parts of the States of Arizona, New Mexico and Utah, over one-third of the voting age citizens on the Navajo Nation Reservation are limited-English proficient and over one-quarter are illiterate. *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1403-1404 (2006) (appendix to the statement of Wade Henderson).

Navajo Reservation, who had been elected to the Apache County Board of Supervisors.[20] The Arizona Court reaffirmed the right of Indians to vote, vacated the injunction and directed the Apache County Board of Supervisors to certify Shirley as the elected supervisor from District 3.[21]

Apache County also discriminated against Indian voters by gerrymandering the districts for the three seats on the County's Board of Supervisors. In the early 1970's, Apache County District 3 had a population of 26,700 of whom 23,600 were Indian, while District 1 had a population of 1,700 of whom only 70 were Indian and District 2 had a population of 3,900 of whom only 300 were Indian. Several Indian voters challenged Apache County for violating the one-person, one-vote rule.[22] Apache County claimed that Indians are not citizens of the United States and the Indian Citizenship Act granting them citizenship was unconstitutional.[23] The three-judge federal court rejected the County's arguments, noted that the County must be redistricted in accordance with one-person, one-vote standards and granted plaintiff's motion for summary judgment.[24]

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[20] *Shirley v. Superior Court for Apache County*, 109 Ariz. 510, 516, 513 P.2d 939, 945 (Ariz. 1973).

[21] *Id.* at 516, 513 P.2d at 945.

[22] *Goodluck v. Apache County*, 417 F. Supp. 13, 14 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976).

[23] 417 F. Supp. at 14.

[24] 417 F. Supp. at 16.

In 1976, Apache County attempted to avoid integration of its public schools to include Indian students by holding a special bond election to fund a new school in the almost entirely non-Indian southern part of the county. Although the special election affected Indian students who would be denied equal schooling, Indian turnout for the election was abnormally low. Investigation demonstrated that the low turnout was a result of the closing of nearly half of the polling places on the reservation, the total lack of language assistance, the absence of Navajo language informational meetings regarding the bond election and the use of English-only in the implementation of absentee voting procedures. This litigation ended in a Consent Decree in which Apache County agreed to a number of changes to the blatant discrimination in voting practices.[25]

Nine Arizona counties are covered under Section 203 for American Indian languages: Apache, Coconino, Gila, Graham, Maricopa, Navajo, Pima, Pinal and Yuma and must provide all election materials, including assistance and ballots, in the language of the applicable language minority group.[26] Of these counties four – Navajo, Apache, Coconino and Pinal – are covered under Section 5 and must have all materials and procedures precleared.

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[25] *Apache County High School No. 90 v. United States*, No. 77-1815 (D.D.C. June 12, 1980).

[26] *See* Implementation of the Provisions of the Voting Rights Act Regarding Language Minorities, 28 C.F.R. § 55.8(a) (2009).

B. Racial Discrimination Against Indians Plague the Election Process in South Dakota, Specifically in Todd and Shannon Counties.

Like Arizona, South Dakota has had a long history of discrimination against American Indians. Todd and Shannon Counties have been the focus of much of the discrimination because the Rosebud Reservation is located in the former, and the Pine Ridge Reservation is in the latter.

The Sioux people of South Dakota have experienced a long struggle to attain full voting rights. The first territorial legislative assembly limited voting to whites. This provision was revoked after passage of the Civil Rights Amendments, but still limited voting to citizens, which excluded most Indians. The territorial civil code expressly prevented Indians from voting. The state's civil code, developed in 1903, specified that Indians could not vote or hold office while "maintaining tribal relations."[27] The state applied a culture test to voting, requiring Indians to abandon their identity, their culture, their language, and their homeland in order to vote. This provision was not repealed until 1951.[28]

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[27] DANIEL MCCOOL, SUSAN OLSON, AND JENNIFER ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 137-138 (Cambridge University Press 2007).

[28] *Id.* at 28.

The repeal of this provision did not automatically result in full voting rights for Indians living in Todd and Shannon Counties. Indians living in these two counties were prohibited from voting for the county officials who governed them. This injustice was finally ended by the Eighth Circuit Court of Appeals in 1975.[29] However, South Dakota still forbade Indians from Todd and Shannon Counties from holding office; that injustice was not struck down until 1980.[30]

In 1976, the counties of Todd and Shannon were placed under the provisions of Section 5 of the Voting Rights Act.[31] The Attorney General of South Dakota, William Janklow, directed the South Dakota Secretary of State to virtually ignore the Voting Rights Act provisions that were "plaguing" the state.[32]

The continuing racial animosities in South Dakota have resulted in a series of reports by the U.S. Commission on Civil Rights. In 1977, the Commission

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[29] *Little Thunder v. South Dakota*, 518 F.2d 1253, 1258 (8th Cir. 1975).

[30] *United States v. South Dakota*, 636 F.2d 241, 243 (8th Cir. 1980).

[31] Partial List of Determinations Pursuant to Voting Rights Act of 1965, as Amended, 41 Fed. Reg. 784 (Jan. 5, 1976); *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1990 (2006) (appendix to the statement of Wade Henderson).

[32] *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1990 (2006) (appendix to the statement of Wade Henderson).

noted that the "voting problems of minorities" in South Dakota were part of the state's "unfinished business in the area of civil rights."[33] In 1981 the Commission again turned its attention to South Dakota to investigate the voting problems of American Indians. Much of this report focused on Todd and Shannon Counties.

II. WHILE THE PROTECTIONS OF SECTION 5 OF THE VOTING RIGHTS ACT HAVE IMPROVED VOTING FOR INDIAN VOTERS, DISCRIMINATION HAS NOT BEEN ERADICATED.

The expiring provisions of the Voting Rights Act include (i) Section 4(b)(4), (ii) Section 5 preclearance, (iii) Section 203 – bilingual elections for American Indians, Asian Americans, Alaska Natives and Spanish heritage speakers who are limited English proficient (LEP), (iv) Section 6 – federal election examiners, and (v) Section 8 – federal election observers. The Voting Rights Act, including the Section 5 preclearance requirement and the minority language provisions, provides necessary protections to American Indian voters from ongoing discrimination. Congress implemented Section 203 of the Voting Rights Act in 1975 based on findings that American

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[33] U.S. COMM'N ON CIVIL RIGHTS, THE UNFINISHED BUSINESS: TWENTY YEARS LATER, A REPORT SUBMITTED TO THE U.S. COMMISSION ON CIVIL RIGHTS BY ITS FIFTY-ONE STATE ADVISORY COMMITTEE. (1977).

Indians, Alaska Natives and other language minorities were prohibited from fully participating in the democratic process.[34] However, even with implementation of Section 5, Section 4(f)(4), and Section 203 protections, the provisions do not provide absolute protection for American Indian voters. Congressional testimony and materials submitted in support of reauthorization of the expiring provisions of the Voting Rights Act demonstrate numerous instances where American Indians have been subject to discrimination since 1982.

In support of reauthorization of Section 5, the House of Representatives Committee to the Judiciary received testimony that revealed a need to extend the temporary and expiring provisions of the Voting Rights Act to protect racial and language minority citizens from discrimination.[35] Laughlin McDonald of the ACLU testified that "there is in fact, abundant modern-day evidence showing that section 5 is still needed in this country and that the right to vote is still in jeopardy,"[36] because there is widespread,

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[34] *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 4 (2005) (testimony of Jacqueline Johnson, National Congress of American Indians).

[35] H.R. REP. NO. 109-478, at 56 (2006).

[36] *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 4 (2005) (testimony of Laughlin McDonald).

systematic voting discrimination against American Indians.[37] The House Committee Report found that Section 5 enforcement authority was critical, because it allowed the Department of Justice and private citizens to monitor covered jurisdictions with a history of discrimination to ensure full compliance of the law.[38] The Committee ultimately found that "substantial discrimination continue[d] to exist in 2006."[39] The Congressional Record supports the Committee's finding and the Congressional reauthorization of Section 5.

A. American Indians Are Disenfranchised by Voting Schemes.

Recent instances of voting discrimination in Indian Country documented in the Congressional Record indicate that the Section 5 preclearance protection of the Voting Rights Act is still necessary to protect American Indian voters. The House Committee Report found that American Indian citizens were subject to voting schemes that prevent American Indians from gaining majority seats by dismantling minority districts.[40] The Committee Report also

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[37] *Id.* at 101. (appendix to the statement of Laughlin McDonald).

[38] H.R. REP. NO. 109-478, at 42 (2006).

[39] *Id.* at 25.

[40] *Id.* at 45.

found that similar tactics kept American Indians from registering and casting effective ballots.[41]

In Northern Arizona, there is extensive history of discrimination against Navajo, Apache, and Hopi voters.[42] Since 1982, there have been two successful cases against the Section 5 covered Counties of Coconino, Navajo, and Apache compelling enforcement of the Voting Rights Act.[43] In 1989, the United States brought forth a claim against Arizona for "unlawfully deny[ing] or abridg[ing] the voting rights of Navajo citizens residing in defendant counties."[44] The Arizona counties settled the claims by consent decree which required the establishment of the Navajo Language Election Information Program including the employment of outreach workers to assist in all aspects of voting by Indian voters.[45] In 1994, Coconino County created two new Superior Court judgeships without seeking preclearance under Section 5. The District

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[41] *Id.*

[42] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1379 (2006) (appendix to the statement of Wade Henderson).

[43] *Id.*

[44] *United States v. State of Arizona*, Civ. No. 88-1989 (D. Ariz. May 22, 1989) (Consent Decree) (as amended Sept. 7, 1993); *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 99 (2005) (appendix to the statement of Bradley J. Schlozman).

[45] *Id.* (appendix to the Statement of Bradley J. Schlozman).

Court held that the judgeships constituted "covered change" and enjoined the judicial election until preclearance was obtained.[46]

American Indian voters in South Dakota continue to encounter racial hostility, polarized voting, and resistance when participating in state and federal elections. Between 1982 and 2006, American Indians in South Dakota were subject to *de jure* and *de facto* discrimination, including having their voter registration cards systematically denied by the county registrar[47] and not being able to vote in elections because they were non-white land owners.[48] There have been nineteen Indian voting rights cases brought against South Dakota; out of those cases, eighteen were decided in favor of the Indian plaintiffs or were settled with the agreement of the Indian plaintiffs.[49] Continued discrimination in South

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[46] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1411-1412 (2006) (appendix to the statement of Wade Henderson).

[47] *American Horse v. Kundert*, Civ. No. 84-5159 (D.S.D. Nov. 5, 1984).

[48] *United States v. Day County*, No. 85-3050 (D.S.D. Oct. 24, 1986); *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2000 (2006) (appendix to the statement of Wade Henderson).

[49] *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 264 (2006).

Dakota necessitates federal oversight over Shannon and Todd counties through the preclearance protections of Section 5.

American Indians in both Arizona and South Dakota have been subject to voting schemes that aim to dilute or pack the Indian vote. In *Goddard v. Babbitt*, the San Carlos Apache Tribe successfully objected to proposed redistricting in 1982 that aimed to split and dilute the Apache vote.[50] The Department of Justice objected to the plan on the grounds that the plan had a discriminatory effect. According to the District Court, the proposed plan "has the effect of diluting the San Carlos Apache Tribal voting strength and dividing the Apache community of interest."[51]

In two South Dakota cases not covered by Section 5 preclearance protection, discrimination in redistricting led to prolonged litigation followed by consent decrees. In *Kirkie v. Buffalo County*, Buffalo County, South Dakota gerrymandered its three districts by packing 75% of the Indian population into one district.[52] The county, the "poorest in the

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[50] *Goddard v. Babbitt*, 536 F. Supp 538, 541 (D. Ariz. 1982); *Voting Rights Act: Evidence of Continued Need, Vol. III: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 3968 (2006) (materials submitted by the Honorable Steve Chabot).

[51] *Id.*

[52] *Kirkie v. Buffalo County*, Civ. No. 03-3011 (D.S.D. Feb. 12, 2004) (Consent Decree); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution*

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country,"[53] was comprised of approximately 2,100 people, of which 83% were American Indian. This redistricting had been implemented with the purpose of diluting the Indian vote, as whites controlled both the other two districts and thus County government.[54] The case was settled by a consent decree wherein the county admitted its plan was discriminatory and was forced to redraw the district lines.[55] Pursuant to the consent decree, the county agreed to subject itself to Section 3(c) of the Voting Rights Act, which requires the submission of voting changes for preclearance.[56] As recent as 2005, another South Dakota county was forced to redraw district lines for similar malapportionment of Indian voters.[57] Section 5 protections

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of the H. Comm. on the Judiciary, 109th Cong. 132-133 (2005) (appendix to the statement of Laughlin McDonald).

[53] *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2019 (2006) (appendix to the statement of Wade Henderson).

[54] *Kirkie v. Buffalo County*, Civ. No. 03-3011 (D.S.D. Feb. 12, 2004) (Consent Decree); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 132-133 (2005) (appendix to the statement of Laughlin McDonald).

[55] *Id.*

[56] *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2005 (2006) (appendix to the statement of Wade Henderson).

[57] *Blackmoon v. Charles Mix County*, No. 05-4017 (D.S.D. 2004); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H.*

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could have prevented this type of *de facto* discrimination, because the changes would have needed preclearance approval prior to enactment.[58]

B. States Have Used Geography to Disenfranchise Indian Voters.

The Congressional Record demonstrates how South Dakota and Arizona have employed geography to decrease voter turnout on reservations. In Arizona, polling locations and voter registration sites on reservations are often located at substantially greater distances from voters than sites located off reservation.[59] Further distances means a greater cost incurred to exercise one's vote.[60] Registering to vote is also an obstacle as a majority of counties bordering reservations limit registration locations to off-reservation towns.[61] In South Dakota, one county failed to provide sufficient polling locations for a school district election. Many Indian voters traveled

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Comm. on the Judiciary, 109th Cong. 156 (2005) (appendix to the Statement of Laughlin McDonald).

[58] Charles Mix County is not covered by Section 5.

[59] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1380, 1411-1412 (2006) (appendix to the statement of Wade Henderson).

[60] *Id.*

[61] *Id.*

up to 150 miles to vote.[62] Only after a federal district court entered a judgment against the County did the County provide additional reservation polling places.[63]

In South Dakota, a hearing in support of a bill to create more on-reservation polling places was scheduled 3 hours away from the reservation at 7:30 a.m., which made it difficult for tribal members to attend and testify.[64] The bill was subsequently defeated. In 2000, the U.S. Commission on Civil Rights noted that "Native Americans do not fully participate in local, state, and federal elections. This absence from the electoral process results in a lack of political representation at all levels of government and helps to ensure the continued neglect and inattention to issues of disparity and inequality" in South Dakota.[65]

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[62] *Black Bull v. Dupree School District*, Civ. No. 86-3012 (D.S.D. May 14, 1986); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 133 (2005) (appendix to the statement of Laughlin McDonald).

[63] . *Black Bull v. Dupree School District*, Civ. No. 86-3012 (D.S.D. May. 14 1986).

[64] *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2027 (2006) (appendix to the statement of Wade Henderson).

[65] *Id.* at 1989.

C. Voter Intimidation at the Polls Disenfranchises American Indian Voters.

The Congressional Record provides evidence that voter intimidation tactics are still employed at various polling places in order to deter language minority voters. The Department of Justice reported instances where observers witnessed language minority voters being harassed and intimidated by polling officials.[66] Congressional testimony described the efforts to discourage the Indian vote by intimidating poll workers and voters at several polling locations on the Navajo Reservation in 2002.[67] In South Dakota, Indian voters have been intimidated by accusations of voter fraud by local officials – that, in turn, created a racially hostile environment at the voter registration sites and voting polls.[68]

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[66] H.R. REP. NO. 109-478, at 45 (2006).

[67] *Voting Rights Act: Sections 6 and 8 The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 16 (2005) (statement of Penny Pew).

[68] *Voting Rights Act: Evidence of Continued Need. Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2007 (2006) (appendix to the statement of Wade Henderson).

D. Section 5 Has Improved Voting Opportunities for Native Language Speakers in Covered Jurisdictions.

Because language has been a significant barrier to voting for American Indians, Section 5 provides equal access to the ballot by American Indians. The House Committee Report found that American Indians continue to experience hardships when attempting to vote, because of their limited ability to speak English and inability to read the ballots.[69] The National Congress of American Indians testified that there are many American Indians, especially elders, who "speak English only as a second language."[70] The illiteracy rate for Arizona Indians is nineteen times the national illiteracy rate.[71] For South Dakota Indians, the illiteracy rate is similarly very high and "[s]ignificant numbers of Indians" require oral and written translation assistance in the Lakota and Dakota languages.[72]

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[69] H.R. REP. NO. 109-478, at 45 (2006).

[70] *Id.* at 46; *Continuing Need for Section 203's Provision for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 309 (2006) (letter by Joe Garcia, NCAI).

[71] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1367 (2006) (appendix to the statement of Wade Henderson).

[72] *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2020-2091 (2005) (appendix to the statement of Laughlin McDonald).

The Department of Justice identified situations in which ineffective language assistance was provided to American Indian voters in the Section 5 covered jurisdictions in Northern Arizona.[73] Navajo and Apache Counties agreed to establish minority language programs to better assist Indian voters as a result of the Department of Justice's efforts.[74] Preclearance under Section 5 ensures that ineffective language assistance will not recur because changes to the election procedures must be precleared.

Congressional testimony revealed that American Indians have historically had low voter participation rates. However, testimony from witnesses in Indian communities noted that participation rates have increased in some communities by as much as 50% to 150%.[75] The House Committee found sufficient evidence of increased participation by language minorities, including American Indians located in Section 5 jurisdictions.[76]

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[73] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1367 (2006) (appendix to the statement of Wade Henderson).

[74] *United States v. State of Arizona*, Civ. No. 88-1989 (D. Ariz. May 22, 1989) (Consent Decree) (as amended Sept. 7, 1993); *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 99 (2005) (appendix to the statement of Bradley J. Schlozman).

[75] H.R. REP. NO. 109-478, at 20 (2006).

[76] *Id.*

Continuation of the protections provided by Section 5 is vital for maintaining and increasing American Indian voter participation. The report on American Indian and Alaska Native progress concluded with the Committee stating, "[t]he Committee believes that these examples reflect the gains that Congress intended language minorities to make under Section 4(f) and 203, and concludes that all American citizens should have the opportunity to participate in the political process."[77] Section 5 of the Voting Rights Act continues to be a critical element in ensuring the ability of Native language speakers the opportunity to knowingly exercise their electoral franchise.

III. SECTION 5 PRECLEARANCE IS A KEY COMPONENT TO PROTECTING THE FUNDAMENTAL RIGHTS OF AMERICAN INDIANS.

In *Thornburg v. Gingles*, the Supreme Court stated that "[b]oth this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes."[78] Indian voters continue to suffer

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[77] *Id.*

[78] 478 U.S. 30, 69 (1986); *Voting Rights Act: Evidence of Continued Need. Vol. II: Hearing Before the Subcomm. on the*

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from some of the highest poverty rates and unemployment rates in the country. Many Indian reservations are rural. In Shannon County, which includes the Pine Ridge Reservation, 52.3% of the families are below the poverty line, and in Todd County, which includes the Rosebud Sioux Reservation, 48.3% of the families live below the poverty line.[79] On Arizona tribal reservations, poverty rates are above 42% with Fort Yuma's rate exceeding 94%.[80] The need for Section 5's preclearance provisions in Indian Country is demonstrated by not only the historical impediments to suppress the Indian vote, but the continuing effects of past discrimination and continuing voter suppression efforts that disenfranchise Indian voters.

A. Native American Voter Registration and Turnout Have Increased.

Seven counties are covered under Section 4(f)(4) for American Indian languages and are subject to the preclearance requirements of Section 5 including four in Arizona, two in South Dakota, and one in North

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Constitution of the H. Comm. on the Judiciary, 109th Cong. 2020 (2006) (appendix to the statement of Wade Henderson).

[79] *Id.*

[80] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1383 (2006) (appendix to the statement of Wade Henderson).

Carolina.[81] Counties subject to preclearance for American Indian languages have past histories of discrimination against Indians and include many limited English proficient speakers.

Prior to Section 5 coverage, American Indians in covered jurisdictions had little opportunity to vote. Section 5 of the Voting Rights Act has resulted in increased participation by Indian voters in the electoral process. The House Judiciary Committee found "that increased participation levels are directly attributable to the effectiveness of the VRA's expiring provisions."[82] The Committee also found that the temporary provisions have protected minority voters and helped them to register to vote unchallenged, cast ballots unhindered, and cast meaningful votes. More Indian voters have registered to vote and turned out to vote since the implementation of Section 5.[83]

B. The Evidence Reveals that There Is a Continued Need for Section 5.

Despite improvements, Indian voters still face obstacles in voting.[84] The need for the continuation of

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[81] "Section 5 Covered Jurisdictions," on the U.S. Dep't of Justice Civil Rights Division website, *available at* http://www.usdoj.gov/crt/voting/sec_5/covered.php.

[82] H.R. REP. NO. 109-478, at 21.

[83] *Id.* at 20.

[84] H.R. REP. NO. 109-478, at 34, 35, 45, 52.

Section 5 was demonstrated by noncompliance, continuing discrimination, consent decrees entered in Arizona and South Dakota for covered jurisdictions as late as 1993 and 2005, and the number of voting cases in Indian Country. From 1999-2005, South Dakota was involved in seven cases regarding violations of Indian voting rights.[85]

Section 5 has improved the political landscape for tribal participation in elections, but it has not eroded animosity against Indian voters nor has it ended all discrimination in voting. In the Renew the Voting Rights Act Report for Arizona, experts found that Arizona still needs to make a lot of progress for Indian voters.

> More than eighty percent of Arizona's twenty-two Section 5 objections have occurred for voting changes enacted since 1982. Four post-1982 objections have been for statewide redistricting plans, including one in the 1980s, two in the 1990s and one as recently as 2002. Since 1982, the Department of Justice has interposed objections to voting changes from nearly half of Arizona's 15 counties that have had the purpose or effect

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[85] *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 259-268 (2005) (materials submitted by Rep. Chabot).

of discriminating against Latino or American Indian voters.[86]

The Indian voters in covered jurisdictions comprise a substantial percentage of the Voting Age Population in those counties. (Todd County, 85.6%; Shannon County, 94.2%; Apache County, 76.88%; Navajo County, 47.74; Coconino County, 28.51%; Jackson County, NC, 10.2%; Pinal County, 6.1%). Therefore, the Indian vote poses a significant threat to the non-Indian voters located in the same political jurisdictions. For these reasons, efforts have been made to suppress the Indian vote.

In this century, Indian voters have been able to ensure the success of candidates in several prominent elections. Recent successes for Indian voters include the 2002 Senate election in South Dakota, in which there was a huge increase in reservation turnout, and Senator Tim Johnson barely won re-election by only 524 votes. In Washington state, a surge of Indian votes ensured Senator Maria Cantwell's narrow win in 2000. In Arizona, reservation voters helped elect Governor Janet Napolitano in 2002.

Successes in Indian voting and threats of Indian voting strength have lead to attacks on Indian voting rights. Arizona and South Dakota passed voter

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[86] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1379 (2006) (appendix to the statement of Wade Henderson).

identification laws requiring identification when voting at the polls, restricting Indian voting rights.[87] Individuals testified that the South Dakota voter identification law was passed in response to the Indian voter turnout in 2002, which helped to elect Senator Johnson.[88] The voter identification law in Arizona resulted in a significant decrease in the number of Native Americans who voted during the 2006 elections.

In 2003, the speaker of the House for the Arizona State Legislature questioned whether a Navajo tribal member may serve as a member of the Commission on Appellate Court Appointments.[89] The specific request questioned "the ability of a member of a sovereign nation to participate 'in the selection process of judges to courts that this individual may not be subject to as a result of his tribe's status.'"[90] The Attorney General affirmed the ability of Indians to participate in all aspects of state government, including serving on court commissions.

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[87] ARIZ. REV. STAT. ANN. § 16-579; S.D. CODIFIED LAWS § 12-18-6.1.

[88] *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 707-710 (2005) (statement of O.J. Semans); *Voting Rights Act: Evidence of Continued Need. Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2026 (2006) (appendix to the statement of Wade Henderson).

[89] Ariz. Att'y Gen. Op. No. 103-007 (2003).

[90] *Id.* at 3.

Further attempts to disenfranchise Indian voters occurred during the 2008 Arizona election when the candidacies of Navajo candidates were challenged because the addresses on the signature petitions included post office boxes and not physical addresses, an impossible task for reservation residents who do not have physical addresses.

Section 5 coverage should have ended disenfranchisement of Indian voters in covered jurisdictions; however, South Dakota failed to preclear voting changes in violation of Section 5.[91] Despite Section 5's requirement that Todd and Shannon Counties submit election changes for preclearance, South Dakota ignored the requirement for a quarter of a century until tribal members from Todd and Shannon Counties filed a lawsuit to force compliance in 2002.[92] In 2002, *Quick Bear Quiver v. Nelson* was resolved by entering into a consent decree, but South Dakota continued to violate the preclearance requirements and *Quiver* Plaintiffs returned to court in 2005 to enforce the consent order.

In 2005, South Dakota passed a law allowing counties to redraw county commissioner districts more than once per decade and the law was immediately implemented without preclearance.[93] Pursuant

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[91] *Quick Bear Quiver v. Nelson*, 387 F. Supp. 1027, 1028 (D. S.D. 2005).

[92] *Id.* at 1028.

[93] *Id.*

to the consent decree, the state submitted 714 statutes and 545 administrative rules for preclearance by April 2005.[94]

Litigation to enforce voting rights is not an effective alternative to Section 5 coverage. Litigation is not quick, easy, or cost-efficient. Tribes cannot afford to challenge every law that impacts Indian voting rights.[95] American Indians challenged an Arizona voter identification law in 2006, but trial on the issue was not scheduled in time to affect the 2008 Presidential Primary Elections.

C. Section 5 Preclearance Continues to Protect American Indian Voters.

The House Committee heard "[t]estimony from many outside groups confirm[ing] the importance of Section 5's enforcement mechanisms, especially in protecting smaller, more rural communities within covered states, where Federal oversight has been limited and non-compliance extensive."[96] Testimony provided examples of on-going discrimination in Indian Country.[97] In 2006, the Eighth Circuit Court of

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[94] *Id.*

[95] *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 715 (2005) (statement of O.J. Semans).

[96] H.R. REP. NO. 109-478, at 43 (2006).

[97] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the*

(Continued on following page)

Appeals found that the city of Martin, South Dakota "has been the focus of racial tension between Native Americans and whites" for over a decade.[98]

The history of discrimination and ongoing discrimination in voting demonstrates a need for the continuation of Section 5.[99] The National Commission on the Voting Rights Act investigated the way in which the federal government and citizens employed the Voting Rights Act in order to combat racial discrimination with regard to voting. The study found that since 1982, the Justice Department had sent out 626 letters objecting to proposed election changes in Section 5 covered jurisdictions, because those changes would have a discriminatory effect. The changes sought by "covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process."[100]

Because covered jurisdictions must submit proposed changes for approval prior to implementation,

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Judiciary, 109th Cong. 500-501 (2006) (statement of Alfred Yazzie); *Voting Rights Act: Evidence of Continued Need, Vol. I and Vol. II, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1363-1453, 1986-2029 (2006) (appendix to the statement of Wade Henderson).

[98] *Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 242 (2006) (statement of Laughlin McDonald).

[99] *Id.*

[100] H.R. Rep. No. 109-478, at 21.

Section 5 deters covered jurisdictions from discriminating.[101] If not for the temporary provisions of the Voting Rights Act, gains would not have been made. Section 5 is needed to protect American Indians in covered jurisdictions.[102]

IV. REAUTHORIZATION IS SUPPORTED BY THE RECORD AND A VALID EXERCISE OF CONGRESSIONAL POWER.

Reauthorization of Section 5 of the Voting Rights Act is a valid exercise of Congressional powers to enforce the Fourteenth and Fifteenth Amendments to the United States Constitutions. In reauthorizing Section 5 of the Voting Rights Act, Congress received evidence of ongoing discrimination. Congress was not willing to jeopardize forty years of progress especially in the face of the evidence of discrimination compiled by the record.[103] "With more and more Indian people

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[101] *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 6 (2005) (statement of Laughlin McDonald).

[102] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 74-75, 218-220 (2006) (appendix to the statements of the Hon. Bill L. Lee and the Hon. Joe Rogers).

[103] *See generally*, S. REP. NO. 109-259 (2006).

participating in elections for the first time,"[104] Section 5 preclearance provisions play an important role in ensuring access to the ballot. This case should be resolved with a ruling in Appellees' favor, because reauthorizing Section 5 of the Voting Rights Act is supported by the Congressional Record and is a valid exercise of Congressional enforcement powers.

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[104] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 310 (2006) (letter by Joe Garcia, NCAI).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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AMICUS CURIAE BRIEF

No. 08-322

In the
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE STATES OF NORTH CAROLINA, ARIZONA, CALIFORNIA, LOUISIANA, MISSISSIPPI AND NEW YORK AS AMICI CURIAE IN SUPPORT OF ERIC H. HOLDER, JR., ET AL.

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INTEREST OF AMICI CURIAE

Sixteen States are covered in whole or in part by the provisions of Section 5 of the Voting Rights Act. 42 U.S.C.A. § 1973c (West Supp. 2007); 28 C.F.R. pt. 51, app. (2008). Each of the Amici States is among the group of sixteen States that must comply with Section 5. The Amici States represent over half of the minority population residing within the States impacted by Section 5.

The Amici States and their political subdivisions have several decades of experience in submitting preclearance requests with the United States Department of Justice. Additionally, many of the Amici States have appeared before this Court as litigants in actions involving preclearance issues. *See, e.g., Lopez v. Monterey County*, 525 U.S. 266 (1999); *Shaw v. Reno*, 509 U.S. 630, 634-36 (1993); *United Jewish Org. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977). Thus, the Amici States have a direct and practical understanding of the costs and benefits of Section 5, including the impact that Section 5 has on our dual system of sovereignty.

The Amici States recognize that Section 5 of the Voting Rights Act has allowed our Nation to make substantial progress toward eliminating voting discrimination. More, however, remains to be done. The Amici States urge this Court to uphold the constitutionality of the 2006 Reauthorization of the Voting Rights Act. Any assertion that Section 5 constitutes an undue intrusion on state sovereignty does not withstand scrutiny. Section 5 does not place an onerous burden on States. States have been able to comply with Section 5 without undue costs or expense.

More importantly, Section 5 has produced substantial benefits within the Amici States and our Nation as a whole.

Congress acted appropriately in reauthorizing the Voting Rights Act in 2006. The Amici States respect and agree with Congress' determination to do so. The Amici States believe that the elimination of Section 5, as urged by Appellant, would undermine the progress that has been made under the Voting Rights Act.

SUMMARY OF ARGUMENT

Appellant argues that Section 5 of the Voting Rights Act constitutes a "severe intrusion on state sovereignty." Appellant's Br., p. 42. The preclearance requirements of Section 5, as those requirements have been applied and administered, however, do not constitute a significant intrusion on States and their political subdivisions. Appellant's argument that Section 5 should be struck down as an affront to federalism is without merit.

The preclearance requirements of Section 5 do not impose undue costs on covered jurisdictions. Administrative preclearance is expeditious and cost-effective. The process is neither difficult nor complicated. Rather, Section 5 preclearance is one of the most streamlined administrative processes within federal government.

Most preclearance submissions can be completed within a relatively short period of time. Moreover, even with respect to complicated submissions (such as

redistricting and annexation), the amount of work necessary to prepare the submission is but a small fraction of the time required to make the election law change in the first place. As a result, the monetary cost of making preclearance submissions is not significant.

Although the preclearance process does result in a minimal delay in the effective date of some state election law changes, such delays are not long and do not constitute a burden on States. The preclearance process in general is swift. The regulations governing Section 5 preclearance place a 60-day deadline on the United States Department of Justice to act on preclearance submissions.

In contrast to the minimal burdens of Section 5, the preclearance process affords covered jurisdictions real and substantial benefits. First, the preclearance process encourages covered jurisdictions to consider the views of minority voters early in the process of making an election law change. This involvement has minimized racial friction in those communities. Second, the preclearance process has helped covered jurisdictions in identifying changes that do in fact have a discriminatory effect, thus allowing them to prevent implementation of discriminatory voting changes. Third, preclearance prevents costly litigation under Section 2. Preclearance provides an objective review of a State's election law changes. That review process tends to diminish litigation challenging election law changes.

Congress acted appropriately in extending the provisions of Section 5. The remedy enacted by Congress is congruent and proportionate to the harm that Congress sought to address, particularly given the minimal burdens and substantial benefits of Section 5. Appellant's efforts to attack Section 5 under the guise of federalism ring hollow.

ARGUMENT

The Amici States share the view of the United States and the intervenors that the Voting Rights Act is one of the most important legislative enactments in our Nation's history. This Court should not jettison the unbroken line of cases upholding the constitutionality of Section 5 of the Voting Rights Act. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterey County*, 525 U.S. 266 (1999). The gains that have been made under the Voting Rights Act are susceptible to being lost if this Court were to strike down Section 5.

This amicus brief does not attempt to repeat the arguments of the United States and intervenors. Rather, it focuses on the unique perspective of the Amici States as jurisdictions impacted by Section 5. Specifically, the Amici States respond to the Appellant's argument that Section 5 is a significant affront to the sovereignty of the States. *See, e.g.*, Appellant's Br., p. 54. It is not. In response to Appellant's assertion that Section 5 is not congruent and proportional to the harm that Congress sought to

address through this legislation, the Amici States wish to make two points. First, Section 5 does not place an onerous burden on covered jurisdictions. The cost of compliance is relatively small. Second, the preclearance process substantially benefits and assists States by encouraging greater minority participation in election law changes and by helping covered jurisdictions to avoid costly and time consuming litigation under Section 2, 42 U.S.C. § 1973.

I. THE BURDENS IMPOSED BY SECTION 5 ON COVERED JURISDICTIONS ARE NOT ONEROUS.

This Court has described the Voting Rights Act as an intrusion on state sovereignty. *See Lopez v. Monterey County*, 525 U.S. 266, 284 (1999). With respect to the preclearance requirements of Section 5, any such intrusion is slight. The Amici States do not believe the requirements of Section 5 to be burdensome or onerous. Rather, our experience demonstrates that the preclearance requirements of Section 5 do not impose undue costs or delays on covered jurisdictions.

The Section 5 administrative review process is designed "to be an expeditious, cost-effective alternative to the Section 5 declaratory judgment process." Civil Rights Division, United States Department of Justice, *About Section 5 of the Voting Rights Act* (www.usdoj.gov/crt/voting/sec_5/making.php). The Amici States have found this to be true.

The process for submitting a preclearance request is not complicated. The procedures for making a submission are set out in clear and precise terms. 28 C.F.R. § 51.1 *et seq.* (2008). The procedures are straightforward and are written in easy to understand language. These procedures are readily available on the Internet to state and local government attorneys, election law officials and the interested public. Civil Rights Division, United States Department of Justice, *Procedures for the Administration of Section 5 of the Voting Rights Act* (www.usdoj.gov/crt/voting/28cfr/51/28cfr51.php).

As Congress is well aware, the United States Department of Justice went to great lengths to ensure that the submission procedures would not burden States. Concerns of state and local officials were taken into account when DOJ drafted its preclearance procedures. *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 64 (2006) (*The Continuing Need*) (testimony of Anita S. Earls, Univ. of N.C.). As a result, the procedure for making a preclearance submission is "the most streamlined administrative process known to the federal government." *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 182 (2006) (*Understanding the Benefits and Costs*) (testimony of Armand Derfner, civil rights attorney, Charleston, SC). States and their political subdivisions, for example, may even make preclearance submissions electronically over the Internet. Civil Rights Division, United States

Department of Justice, *How To File An Electronic Submission Under Section 5 of the Voting Rights Act* (http://wd.usdoj.gov/crt/voting/sec_5/evs/). Moreover, DOJ is committed to working with state and local governments to make the preclearance process work. DOJ has an excellent working relationship with state and local election officials in the covered jurisdictions. *The Continuing Need* 64 (testimony of Anita S. Earls); *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 310 (2006) (*Policy Perspectives*) (testimony of Donald M. Wright, Gen. Counsel, N.C. Bd. of Elections).

The information that must be provided in connection with a preclearance submission is relatively simple. The covered jurisdiction must provide: a copy of the statute, ordinance or procedure being changed; a copy of the proposed statute, ordinance or procedure; an explanation of the differences between the two if not readily apparent from the face of the documents; contact information for the person making the submission; the name of the jurisdiction making the submission; the statutory or other authority that provides the authority for making the change; the date of adoption; the effective date of the change; a statement that the change has not yet been enforced; the reasons for the change; the anticipated effect on minority voters; identification of all litigation concerning the change; and a statement that the prior

practice has been precleared.[1] 28 C.F.R. § 51.27 (2008). As a result, the vast majority of submissions can be prepared relatively quickly with little effort beyond the work necessary to make the election law change in the first place.

In considering whether to reauthorize Section 5, Congress was made aware that although several States expressed initial resistance to the preclearance process when the Voting Rights Act was originally adopted, by 2006 the process for seeking preclearance had become painless and routine for States. The time and cost to make a preclearance submission is relatively small. As one state election law official explained to Congress, the average submission (excluding redistricting and annexations) requires less than one hour of personnel time to prepare. *Policy Perspectives* 313 (testimony of Donald M. Wright). Some, though not all, submissions may be completed in a few minutes. *Id.* Except for redistricting and annexation submissions, the cost to the covered jurisdiction is "insignificant." *Id.* As another witness explained, "[t]he task of preparing the submission is usually a fraction of the work involved in making the voting change." *Understanding the Benefits and Costs* 182 (testimony of Armand Derfner). The effort necessary to complete a preclearance submission is far less than that required by many other state and federal regulations. *Id.* at 81. Preparing a preclearance submission is not difficult. *Id.* at 25

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[1] Certain additional information must be provided in connection with redistricting, annexation or when requested by the Attorney General. 28 C.F.R. § 51.27(q), (r) (2008).

(testimony of Fred D. Gray, civil rights attorney, Montgomery, AL). Rather, it is "a small administrative act." *Id.*

Although the submissions in connection with redistricting or annexation require more than a few minutes to complete, the work that is necessary to support such a submission is prudent for all jurisdictions (regardless of whether they are covered by Section 5) in order to ensure compliance with Section 2. If, for example, a State has not evaluated its proposed redistricting plan against the factors set out in this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), the State faces a risk that the redistricting plan will be challenged under Section 2. Consequently, when preparing redistricting plans, most States conduct rigorous statistical analyses of their proposed redistricting plans before a final plan is adopted. Such a statistical analysis – which is routine in virtually any redistricting – is generally sufficient to complete the Section 5 preclearance submission. *See* 28 C.F.R. §§ 51.27(q), 51.28 (2008). Thus, even with respect to redistricting and annexation submissions, the preclearance requirements do not impose a substantial burden on States. Moreover, the work required to complete the submission is minuscule when compared to the importance of redistricting to the States and their citizens.

Not only is the monetary cost to States in complying with Section 5 *de minimis*, the intrusion on state sovereignty as a result of delay in implementing state election law changes is also minimal. The experience of the Amici States is that the United

States Department of Justice acts expeditiously in processing Section 5 submissions. This is borne out by both the DOJ's procedures and the testimony presented to Congress. The regulations governing Section 5 preclearance place a 60-day deadline on DOJ to act.[2] 28 C.F.R. § 51.42 (2008). Moreover, the procedures expressly permit a covered jurisdiction to request expedited review when a response is needed in less than 60 days. 28 C.F.R. § 51.34 (2008). DOJ has diligently responded to requests for expedited review. *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 354 (2006) (*Legislative Options*) (statement of Dana M. Oliver, General Registrar, Salem, VA); *Policy Perspectives* 123 (testimony of Donald M. Wright). As one witness explained, "[t]he administrative process is swift. A change has to be precleared within 60 days, and in some cases, it can be pre-cleared almost overnight." *Understanding the Benefits and Costs* 10 (testimony of Armand Derfner).

Given the streamlined and routine nature of Section 5 submissions, it is not surprising that the majority of election law officials in covered jurisdictions do not find Section 5 to be burdensome. *The Continuing Need* 64 (testimony of Anita S. Earls)

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[2] If the covered jurisdiction does not submit adequate information, however, DOJ may request additional information, thereby extending the 60-day period. 28 C.F.R. § 51.37 (2008).

(noting that most election law officials do not find Section 5 to be burdensome); *see Legislative Options* 354 (statement of Dana M. Oliver) (local election official noted that preclearance submissions are "routine and not a huge burden"); *Understanding the Benefits* 195 (statement of Senator Patrick J. Leahy) ("Section 5 is supported by many local officials in covered jurisdictions . . . ."). Before Congress, the General Counsel for the North Carolina Board of Elections testified that "[m]ost of the North Carolina covered jurisdictions do not see Section 5 preclearance as a burden, it has become a routine administrative matter taking little time or expense to comply with." *Policy Perspectives* 115 (testimony of Donald M. Wright); *see The Continuing Need* 64 (testimony of Anita S. Earls).

"[M]any of the costs and inconveniences [of Section 5] are overstated." *Policy Perspectives* 142 (testimony of Debo P. Adegbile, NAACP Leg. Def. & Ed. Fund). This is true in substantial part because much of the work that is needed to prepare a submission has already been done in connection with the original determination to make an election law change. The preparation of the preclearance submissions "is typically a tiny reflection of the work, thought, planning, and effort that had to go into making the change to begin with." *Understanding the Benefits and Costs* 10 (testimony of Armand Derfner). The Amici States agree with the repeated testimony before Congress that the administrative burden of complying with Section 5 is not great. *See, e.g., id.*

In fact, the record in this case proves this very point. The Appellant's cost of complying with Section 5 is $223 per year. *See* J.S. App. 152. In contrast, the Appellant's cost to bind and print the Joint Appendix alone was $16,667. Invoice of Cockle Printing Co. (received by the Clerk of the United States Supreme Court on Mar. 18, 2009). This sum would cover the costs of the Appellant's preclearance submissions for well in excess of seven decades. Thus, the burden of complying with Section 5 is far less for the Appellant than the burden of complying with Supreme Court Rule 26.

Section 5 does not impose appreciable burdens on covered jurisdictions. A covered jurisdiction may adopt any election change that does not have a discriminatory effect or discriminatory purpose. Covered jurisdictions are merely required to carry the burden of proving this before such a change takes effect. Section 5 stands as an effective and cost-efficient means to ensure that discriminatory changes are not adopted in covered jurisdictions. The costs and obligations imposed by Section 5 on covered jurisdictions are not onerous.[3]

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[3] Appellant also asserts that Section 5 "imposes a scarlet letter on residents of covered jurisdictions." Appellant's Br., p. 58. This argument has no factual basis. Few people, other than judges, scholars and public officials, are even aware of which jurisdictions are covered. Additionally, designation as a covered jurisdiction is neither punitive nor inescapable. Under the bailout provisions, the designation can be removed if current circumstances allow the covered jurisdiction to meet the criteria of 42 U.S.C. § 1973b.

II. THE BENEFITS TO COVERED JURISDICTIONS RESULTING FROM THE PRECLEARANCE PROCESS MUST NOT BE IGNORED.

As set out in the record before Congress, the preclearance process substantially benefits covered jurisdictions. These benefits must not go ignored in considering whether Congress acted appropriately in extending the provisions of Section 5.

First, the preclearance process substantially benefits Section 5 States by encouraging the input of minority voters at an early stage of a State's efforts to change its election practices and procedures. *Policy Perspectives* 125 (testimony of Donald M. Wright) (Section 5 forces covered jurisdictions "to focus early in the process of determining voting/election actions upon the possible effect of the action upon minorities."). The preclearance submission must include a statement of "the anticipated effect of the change on members of racial or language minority groups." 28 C.F.R. § 51.27(n) (2008); *see The Continuing Need* 141 (testimony of Anita S. Earls). In order to provide such a statement, covered jurisdictions almost universally consult with minority voters before making an election law change. As a result of such minority involvement, covered jurisdictions are much better situated than non-covered jurisdictions in ferreting out, at an early stage in the process, proposed changes that would have a discriminatory effect on minority voters. Additionally, by including minority voters in the process, the final enactment is much less likely to result in divisiveness among racial groups.

As a result of Section 5, "minority voters have a greater involvement in decisions about election procedures as they are being made." *The Continuing Need* 22 (testimony of Anita S. Earls). In a covered jurisdiction, for example, election officials typically will consult with minority voters before moving a polling place.[4] This dialog strengthens communities and helps ensure that "harmful effect[s] on minority voters are stopped." *Id.* at 141. Such consultations do not typically occur in non-covered jurisdictions, even though they should. *See id.* at 22. In short, Section 5 "plays an important educative function in covered jurisdictions." *Policy Perspectives* 141 (testimony of Debo P. Adegbile). The communication that flows from a preclearance submission "facilitates public awareness and compliance with the law even short of the provision's affirmative deterrence effects." *Id.*

Second, Section 5 both prevents discrimination and helps protect covered jurisdictions against allegations of discrimination – an immeasurable benefit to covered jurisdictions.[5] *Policy Perspectives*

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[4] Appellant speaks of moving polling places as a trivial matter that does not need fly-specking by DOJ. Appellant's Br., p. 14. Moving a polling place from a building that is known and readily accessible by minorities to a building operated by a fraternal organization with a history of segregation can significantly diminish minority turnout. *Policy Perspectives* 54 (testimony of Debo P. Adegbile); *see* J.S. App. 181-83.

[5] As a result, it is not uncommon for jurisdictions that are not covered by Section 5 to inquire whether it is possible to submit their election law changes to DOJ for

124 (testimony of Donald M. Wright). As one election law official noted, review by DOJ helps to shield the covered jurisdiction from discrimination claims. *Policy Perspectives* 115 (testimony of Donald M. Wright); *see also The Continuing Need* 64 (testimony of Anita S. Earls) (Preclearance allows local election law officials to "deflect criticism by minority voters by pointing out that the redistricting plan, or polling place change, for example, had been precleared by the Department of Justice."); 1 *Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. 66 (2006) (testimony of J. Gerald Hebert, former Acting Chief, Civil Rights Div., U.S. Dep't of Justice) ("A lot of jurisdictions like section 5 preclearance and like to get a stamp of approval from the Justice Department that their voting system is non-retrogressive."). The opportunity for a State or local government to obtain such a review from the federal government is a "rarity in our federal system of government and should be viewed in a positive light." *Policy Perspectives* 115 (testimony of Donald M. Wright). Moreover, because preclearance tends to prevent discriminatory changes from even being proposed, both the covered jurisdiction and its citizens are benefitted. *See The Continuing Need* 6 (testimony of Pamela S. Karlan, Stanford Univ. Sch. of Law) (discussing deterrent effect of Section 5); 1 *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 2d

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preclearance.

Sess. 19 (2006) (testimony of Nadine Strossen, President, ACLU) (noting that Section 5 has prevented implementation of discriminatory voting changes); *Understanding the Benefits and Costs* 4 (testimony of Fred D. Gray) (noting deterrent effect).

Third, the preclearance process helps States to prevent costly Section 2 litigation. As noted above, the preclearance process serves to prevent covered jurisdictions from implementing discriminatory voting changes. Additionally, although Section 5 preclearance does not render a State immune from litigation, it provides an objective review of a State's election law changes. That process serves to diminish the likelihood of litigation challenging those election law changes. Thus, Section 5 is a cost-effective means of preventing litigation. *See Policy Perspectives* 141 (testimony of Debo P. Adegbile). Many, if not most, of DOJ's objections therefore represent potential Section 2 claims that have been averted. *Id.*

Section 2 litigation is extremely costly for States. *The Continuing Need* 15 (testimony of Pamela S. Karlan) (noting that Section 2 litigation is costly, requiring "huge amounts of resources in the litigation process"). Section 2 cases stand among the most complex litigation matters brought in federal court. *Understanding the Benefits and Costs* 181 (testimony of Armand Derfner). These claims require detailed expert testimony and an enormous amount of attorney time. *Id.* Such litigation frequently takes years to resolve. As a result, Section 2 litigation is extraordinarily expensive. Moreover, if the State does not prevail, it will face a substantial claim for

attorneys' fees under 42 U.S.C. § 1988. *See, e.g.*, *Barnett v. City of Chicago*, 122 F. Supp. 2d 915 (N.D. Ill. 2000) (awarding $7,271,759 in attorneys' fees and expenses); *Jeffers v. Tucker*, 835 F. Supp. 1101 (E.D. Ark. 1993) (reducing award of attorneys' fees and expenses from $1,034,492 to $725,747). Section 5 helps States to avoid such costly litigation. *The Continuing Need* 14-15 (testimony of Anita S. Earls); *Policy Perspectives* 120 (testimony of Donald M. Wright). The preclearance process of Section 5 is much more cost efficient and far less burdensome than Section 2 litigation.

The benefits of Section 5 greatly exceed the minimal burdens that Section 5 may impose on States and their political subdivisions. Congress appropriately concluded that the provisions of Section 5 should continue in place.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the District of Columbia should be affirmed.

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AMICUS CURIAE BRIEF

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In the
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,
Appellant,

v.

ERIC H. HOLDER, JR.,
Attorney General, et al.,
Appellees.

**On Appeal from the
United States District Court
for the District of Columbia**

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AND PROJECT 21 IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

1. Section 5 of the Voting Rights Act (Act) requires that certain states and political subdivisions seek approval from the federal government before making any change affecting voting procedures. Section 4(a) of the Act permits these covered jurisdictions to opt out of Section 5 coverage if they can establish a ten-year history of compliance with the Act. The first question presented is whether Section 4(a) must be available to any political subunit of a covered state when the Court's precedent requires "political subdivision" to be given its ordinary meaning throughout most of the Act and no statutory text abrogates that interpretation with respect to Section 4(a)?

2. Beginning with *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court has consistently required that remedial legislation be congruent and proportional to the substantive constitutional guarantees it seeks to enforce. In 2006, Congress enacted the 2006 Voting Rights Act Reauthorization and Amendments Act, which extended Section 5's coverage without modification until the year 2031. The second question presented is whether under the congruence and proportionality standard, or even under a purportedly less stringent rational-basis standard, that enactment can be applied as a valid exercise of Congress's remedial powers under the Fourteenth and Fifteenth Amendments when it was founded on a congressional record demonstrating no evidence of a persisting pattern of attempts to evade court enforcement of voting rights guarantees in jurisdictions covered only on the basis of data 35 or more years old?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity, and Project 21, the National Leadership Network of Black Conservatives, submit this brief amicus curiae in support of Appellant.[1] PLF was founded 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has extensive litigation experience in the area of group-based racial preferences and civil rights. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by the United States Supreme Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). PLF submits this brief because it believes its public policy perspective and litigation

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

experience in the area of voting rights will provide an additional viewpoint with respect to the issues presented. PLF participated as amicus curiae in past Voting Rights Act cases such as *Bartlett v. Strickland*, No. 07-689 (argued before this Court on Oct. 14, 2008); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); and *City of Rome v. United States*, 446 U.S. 156 (1980).

The Center for Equal Opportunity (CEO) is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports color blind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and voting. CEO has participated as amicus curiae in past Voting Rights Act cases, such as *Bartlett v. Strickland*, No. 07-689 (argued before this Court on Oct. 14, 2008), and *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). In addition, officials from CEO testified before Congress several times during the recent reauthorization of the Voting Rights Act.

Project 21, the National Leadership Network of Black Conservatives, is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 participated as amicus curiae in the Voting Rights Act case of *Bartlett v. Strickland*. Project 21 participants

seek to make America a better place for African-Americans, and all Americans, to live and work.

Amici Curiae have a substantial interest in preventing the racial segregation and gerrymandering of voting districts that is the result of Section 5's intrusiveness into traditional state functions, and will show that the 2006 enactment extending the preclearance requirements of Section 5 of the Voting Rights Act is beyond Congress's remedial powers under the Fourteenth and Fifteenth Amendments.

INTRODUCTION AND SUMMARY OF ARGUMENT

The historic election of President Barrack Obama stands as a remarkable testament to the tremendous progress this country has made in terms of racial equality and voting rights. As Americans proudly watched President Obama's inauguration, it must have been difficult for many to imagine that forty-four years ago, state and local governments deliberately disenfranchised blacks in the Deep South, and that the federal government enacted "the most aggressive assertion of federal power over voting issues since the Civil War and Reconstruction" the Voting Rights Act of 1965 (Act) to end it. Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 How. L.J. 741, 745 (2006).

The Act, as originally enacted, allowed the Attorney General to deploy federal examiners to the South to take over state and local voter-registration functions. Adopted as an extreme temporary measure, Section 5 of the Act required every political subdivision targeted by the Act to obtain permission from the

federal government before any change to election procedures, no matter how minor, could take place. Today, Section 5 continues to place only certain state and local governments under a form of federal receivership, often without rhyme or reason. However, the "insidious and pervasive evil" of racism in the Deep South, which once justified Section 5's uniquely burdensome remedy, has greatly diminished. *See South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (describing the "insidious and pervasive evil" in parts of the South).

In *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997), this Court explained that for Congress's remedial authority under the Fourteenth and Fifteenth Amendments there must be a congruence and proportionality between the injury to be prevented and the means adopted to that end. Nevertheless, the district court below struggled over whether to apply the *City of Boerne*'s "congruence and proportionality standard," or a separate "rationality" standard. In doing so, the court mistakenly reasoned that the *City of Boerne* standard applied only to Congress's remedial powers under Section 5 of the Fourteenth Amendment, while the "rationality test" applied to Congress's enforcement powers under Section 2 of the Fifteenth Amendment. In its analysis, the court overlooked that *City of Boerne* drew explicitly from Section 2 cases, and that one standard the congruence and proportionality test should be used to evaluate congressional power to enforce the Reconstruction Amendments.

Had the district court come to the proper conclusion that the congruence and proportionality standard applies to legislation enacted to enforce substantive rights granted under the Fourteenth *and*

Fifteenth Amendments, and applied that standard correctly, the court would have determined that Section 5 of the Act is no longer a valid exercise of Congress's remedial powers.

Changes in the social and political landscape cast doubt on, not only Section 5's relevance, but its constitutionality. These changes show that the justifications for Section 5's remedial measures no longer exist. For instance, when the Act was enacted in 1965 there were few, if any, black elected officials in the South. But now black elected politicians make up an appreciable percentage of many state governments of the Deep South. Forty years ago the drafters of the Act understood that widespread and persistent intentional discrimination in voting occurred predominantly in the jurisdictions targeted, and typically entailed the wilful misuse of tests and devices which Section 5 was specifically designed to remedy. But modern allegations of discrimination in voting may arise equally in both covered and noncovered jurisdictions, and involve a completely different array of problems which Section 5 is ill-suited to resolve.

Nevertheless, in 2006, Congress renewed Section 5 through the Voting Rights Act Reauthorization and Amendments Act. Prior to its passage, several prominent voting rights scholars pointed out the modern landscape in which the Act now operates. These dramatic changes call into question the Act's constitutionality. Without addressing these concerns, Congress extended Section 5's intrusive and constitutionally troubling coverage for another 25 years. Amici urge this Court to find Section 5 unconstitutional.

ARGUMENT

I

THIS COURT HAS ALWAYS APPLIED A STANDARD OF REVIEW HIGHER THAN THE "RATIONALITY" STANDARD TO LEGISLATION PASSED UNDER THE ENFORCEMENT CLAUSES OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS

When discussing the enforcement powers of the Reconstruction Amendments, this Court has routinely interchanged Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. *See City of Boerne*, 521 U.S. at 518-28; *Katzenbach v. Morgan*, 384 U.S. 641, 648-51 (1966); *James v. Bowman*, 190 U.S. 127, 137-39 (1903). The district court, however, differentiated between the standards to be applied in cases arising under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. *Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey*, 573 F. Supp. 2d 221, 235-46 (D.D.C. 2008). Specifically, the district court held that under the Fourteenth Amendment, a statute must be congruent and proportional to the right asserted under that Amendment, but under the Fifteenth Amendment a statute need only survive a "rationality test." *Id.* at 241-46.

This Court never has identified two independent tests for legislation passed pursuant to Congress's Fourteenth and Fifteenth Amendments enforcement powers. The district court's "double standard" should be rejected for two reasons. First, Section 2 of the Fifteenth Amendment, proposed less than a year after

the Fourteenth Amendment was ratified, is nearly identical to Section 5 of the Fourteenth Amendment in its text, history, and treatment by this Court. *Compare* U.S. Const. amend XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."), *with* U.S. Const. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."). Second, this Court has consistently and universally applied more than a "rationality" standard of review to legislation passed pursuant to Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. This Court should make clear that, for legislation enacted under the enforcement provisions of the Reconstruction Amendments, there must be congruence and proportionality between the alleged constitutional injury and the means adopted to remedy it.

A. The Text and History of Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment Require That Legislation Enacted Pursuant to These Clauses Be Reviewed Under the Same Standard

Section 5 of the Fourteenth Amendment, also known as an "Enforcement Clause," reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. Once ratified the Enforcement Clause of the Fourteenth Amendment would come to represent "a positive grant of legislative power." *Morgan*, 384 U.S. at 651. The debate surrounding ratification of the Enforcement Clause clarified, however, that the new grant of legislative power

should be seen as "remedial and preventive" in nature. *See City of Boerne*, 521 U.S. at 520-24 (discussing the ratification history of the Fourteenth Amendment). Ultimately, in July, 1868, the Fourteenth Amendment was ratified and became part of the Constitution of the United States. U.S. Const. amend. XIV; *see also* Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 Ala. L. Rev. 555, 575 (2002) (discussing issues surrounding ratification). Since ratification of the Fourteenth Amendment, this Court never has questioned the remedial and preventive nature of the Enforcement Clause. *See City of Boerne*, 521 U.S. at 525 (noting that the Court has always viewed Congress's power under Section 5 of the Fourteenth Amendment as corrective or preventive) (citing *United States v. Reese*, 92 U.S. 214, 218 (1875); *United States v. Harris*, 106 U.S. 629, 639 (1883); *James*, 190 U.S. at 139).

The Fifteenth Amendment passed in both Houses of Congress less than a year after the Fourteenth Amendment was ratified. *See* U.S. Const. amend XV; James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 Wm. & Mary Bill Rts. J. 443, 483-85 (1999) (discussing the congressional history of the Fifteenth Amendment). By February 1870, the Fifteenth Amendment was ratified, containing an enforcement clause that mirrors the language of the Fourteenth Amendment's Enforcement Clause: "The Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend XV, § 2; *see also United States v. Price*, 383 U.S. 787, 804-05 (1966) (discussing ratification of the Reconstruction

Amendments). The purpose of the Enforcement Clause of the Fifteenth Amendment mirrors the purpose of the Fourteenth Amendment's Enforcement Clause. "[M]any Republicans believed that the Fifteenth Amendment would remain ineffective until and unless it was enforced by additional federal laws . . . . [I]f no further federal laws were enacted, racial discrimination in voting would be constitutionally feasible." Xi Wang, *The Making of Federal Enforcement Laws, 1870-1872*, 70 Chi.-Kent L. Rev. 1013, 1020 (1995). In other words, the Republicans proposing the Amendment understood that legislation to remedy and prevent racial discrimination in voting would be needed to enforce appropriately Section 1 of the Fifteenth Amendment.

Given that the text and purpose of the two Enforcement Clauses are nearly identical, it is unsurprising that this Court has iterated continuously that the clauses should be interpreted the same. *See, e.g.*, Victor Andres Rodriguez, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance*, 91 Cal. L. Rev. 769, 786 (2003) (noting the Court interprets the Enforcement Clauses similarly because of their parallel histories and texts); *Lopez v. Monterey County*, 525 U.S. 266, 294 n.6 (1999) (Thomas, J., dissenting) ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as coextensive.").

In *City of Boerne*, which arose under Section 5 of the Fourteenth Amendment, this Court used cases arising under Section 2 of the Fifteenth Amendment to explain the standard courts should apply to Congress's Fourteenth Amendment Enforcement Clause power.

See City of Boerne, 521 U.S. at 518 (citing *Katzenbach*, 383 U.S. at 308; *Oregon v. Mitchell*, 400 U.S. 112 (1970); *City of Rome*, 446 U.S. 156). Moreover, the *City of Boerne* Court explicitly stated Congress's powers under both Enforcement Clauses were "parallel." *City of Boerne*, 521 U.S. at 518. Even in a post-*City of Boerne* decision, this Court has observed that, "Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001).

The district court in this case dismissed this Court's statements in *City of Boerne* and *Garrett*, however, as "dicta." *Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 243. Yet, in both *City of Boerne* and *Garrett*, this Court cited Fifteenth Amendment precedents to elucidate the standard to be applied in Fourteenth Amendment cases. *See City of Boerne*, 521 U.S. at 518; *Garrett*, 531 U.S. at 373. Clearly, "the . . . limitations on Congress's Fourteenth Amendment enforcement power extend also to its Fifteenth Amendment enforcement power." *Rodriguez*, *supra*, at 774. At a minimum, treating the Enforcement Clauses differently would turn this Court's reasoned analysis on its head.

B. This Court has Applied Consistently a More Demanding Standard than Mere "Rationality" to Statutes Passed Pursuant to Congress's Enforcement Clause Powers

Despite this Court's consistent pronouncement that the two Enforcement Clauses should not be treated differently, the district court below determined

that courts are required to apply different standards of review depending upon whether the legislation is passed under Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment. *Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 235-46. Specifically, the district court said that when Congress invokes its power under Section 2 of the Fifteenth Amendment, courts are required to apply a more relaxed, "rationality" standard of review. *Id.* at 236-39. To make its case, the district court examined a number of this Court's precedents holding various portions of the Voting Rights Act constitutional. *Id.* at 236-39. Upon closer inspection the district court's distinction falls apart.

First, as discussed above, the text and history of both Enforcement Clauses, coupled with this Court's clear reasoning, demonstrate convincingly that there is no meaningful distinction between the two Enforcement Clauses. Second, as elaborated below, the "congruence and proportionality" standard discussed in *City of Boerne* is a clearer articulation of this Court's previous jurisprudence with respect to both Enforcement Clauses. In no way should this Court's past decisions upholding portions of the Voting Rights Act under Section 2 of the Fifteenth Amendment be read to require that a standard be used for Section 2 cases that is different from the standard used in cases arising under Section 5 of the Fourteenth Amendment.

1. The "Congruence and Proportionality" Standard Applied to the Early Cases Upholding the Voting Rights Act of 1965

The Act was passed by Congress in 1965 in order to combat the evils of official discrimination in voting. *Katzenbach*, 383 U.S. at 308, 315. Immediately, South Carolina challenged the Act as an unconstitutional exercise of congressional power under Section 2 of the Fifteenth Amendment. *Id.* at 307. Two distinct issues were present in *Katzenbach*: (1) whether the Act encroached on powers reserved to the states; and (2) whether the Act was beyond Congress's Enforcement Clause powers. The *Katzenbach* Court first noted: "*As against the reserved powers of the States*, Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 324 (emphasis added). While the district court read this passage as providing the standard courts should apply to determine whether Congress has the power to pass legislation in the first instance, *see Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 236-37, the *Katzenbach* passage simply describes Congress's power vis-a-vis the states only. "The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power." *Id.* at 325.

Immediately after its "rational means" language, the *Katzenbach* Court clarified that this phrase should not be considered the standard by which Congress's Enforcement Clause power is evaluated: "We turn now to a more detailed description of the standards which govern our review of the Act." *Id.* at 324. To resolve

this issue, the *Katzenbach* Court looked to the text of the Fifteenth Amendment, which allows Congress to "enforce the prohibitions by *appropriate* legislation." *Id.* at 326 (citing *Ex parte Virginia*, 100 U.S. 339, 345 (1879)) (emphasis added). By citing *Ex parte Virginia* here, the *Katzenbach* Court demonstrated that for congressional legislation to be a legitimate exercise of Congress's Enforcement Clause powers, something more than mere "rational basis" review is required.

The district court decided this case on the basis that the *Katzenbach* holding required application of the "rationality standard." But the district court failed to reconcile that view with the fact that the *Katzenbach* Court refused to actually apply "rational basis" review.[2] *See Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 237, 241. While the district court may have phrased its review differently, it clearly applied the well-known "rational-basis" review. *See id.* at 246 ("we ask whether Congress could rationally have concluded"). Furthermore, by phrasing the *Katzenbach* holding as the "rationality" standard, the district court reads each case affirming *Katzenbach* as also applying the "rationality standard." *See Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 237-39.

In the post-*Katzenbach* cases, while the Court reaffirmed *Katzenbach*, it did not reaffirm the "rationality standard" as understood by the district court. Rather, the Court continued (often explicitly) the tradition established in *Ex parte Virginia* which held that "legislation is appropriate [when it is]

[2] By 1966, "rational basis" review was prevalent in the Supreme Court. *See, e.g., United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938); *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 509 (1937).

adapted to carry out the objects the amendments have in view." *Ex parte Virginia*, 100 U.S. at 345. In *Morgan*, for example, the Court invoked explicitly *Ex parte Virginia* when discussing the standard to apply under Section 5 of the Fourteenth Amendment. *Morgan*, 384 U.S. at 648. The *Morgan* Court refused to apply the familiar "rational basis" review, opting instead to clarify that Section 5 requires that legislation be "'*plainly adapted*' to furthering [the] aims of the Equal Protection Clause." *Id.* at 652 (emphasis added). Similarly, *Georgia v. United States*, 411 U.S. 526 (1973), "reaffirm[ed] that the Act is a permissible exercise of congressional power under [Section] 2 of the Fifteenth Amendment." *Georgia*, 411 U.S. at 535. The *Georgia* holding no more invokes the district court's "rationality standard" than do *Katzenbach* or *Morgan*.

The district court also relies heavily on *City of Rome* for formulating its "rationality standard." *See Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 241-43 (citing *City of Rome*, 446 U.S. 156). *City of Rome*, however, is again simply reaffirming the standard applied in *Katzenbach* and *Morgan*. The *City of Rome* Court cites to *Ex parte Virginia*, *Katzenbach*, and *Morgan* for the standard to be applied when Congress invokes its enforcement power under the Reconstruction Amendments. *City of Rome*, 446 U.S. at 172-78. Moreover, the *City of Rome* Court makes clear that the standard is more than mere "rationality." *City of Rome*, 446 U.S. at 177 ("[U]nder [Section] 2 of the Fifteenth Amendment Congress may prohibit practices . . . so long as the prohibitions attacking racial discrimination in voting are

'appropriate,' as that term is defined in *McCulloch v. Maryland*, [17 U.S. 316 (1819)], and *Ex parte Virginia*.").

In short, when properly viewed, the cases relied upon by the district court for its "rationality standard" begin, not with *Katzenbach*, but rather *McCulloch* and *Ex parte Virginia*. Moreover, this Court has continuously applied something more than mere "rationality" when upholding the various portions of the Act as constitutional assertions of Congress's Section 2 power. Had the district court read properly *Katzenbach* and its progeny, it would have applied a heightened standard of review a point clarified by this Court in *City of Boerne*. *City of Boerne*, 521 U.S. at 519-20.

2. *City of Boerne* Clarifies the Standard of Review to Be Applied to All Legislation Passed by Congress Pursuant to Its Enforcement Clause Powers

In 1997, this Court precisely and clearly expressed that the standard to be applied to legislation passed pursuant to Congress's Enforcement Clause power is more than mere "rationality." *City of Boerne*, 521 U.S. 507. The *City of Boerne* Court began its analysis in the same place as it did in early cases with a clear understanding of *McCulloch* and *Ex parte Virginia*. *City of Boerne*, 521 U.S. at 516-18. Quoting the latter case at length, the *City of Boerne* Court reiterated that "appropriate" legislation requires that the legislation be "adapted to carry out the objects the amendments have in view." *Id.* at 517 (quoting *Ex parte Virginia*, 100 U.S. at 545).

The *City of Boerne* Court then delved into an analysis of the cases relied upon by the district court for its "rationality standard." *See City of Boerne*, 521 U.S. at 518 (discussing the holdings of *Katzenbach*, *Morgan*, and *City of Rome, et al.*) Distilling these cases, the *City of Boerne* Court came to a conclusion not reached by the district court here namely, that Congress's enforcement power extends only to enforcing and remedying the provisions of the amendment. *City of Boerne*, 521 U.S. at 519. "It has been given the power to enforce, not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the provisions of the Fourteenth Amendment." *Id.* (quoting *Katzenbach*, 383 U.S. at 326) (internal quotations omitted).

This Court clarified:

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. *There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.* Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

City of Boerne, 521 U.S. at 519-20 (emphasis added). *City of Boerne* made clear what the district court confused: Congress must have more than a mere rational basis for passing legislation pursuant to its Enforcement Clause powers.

3. Since *City of Boerne*, This Court Has Always Applied the "Congruence and Proportionality" Test when Determining the Constitutionality of Legislation Enacted Pursuant to Congress's Enforcement Clause Powers

The district court made one final legal observation for applying a "rationality" standard only for legislation enacted pursuant to Section 2 of the Fifteenth Amendment. Calling it the "final case in the [rationality] series," the district court read *Lopez*, 525 U.S. 266, as a case applying a more relaxed standard of review than *City of Boerne*. *Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 239. The lower court misread the case.

The *Lopez* Court was not presented with the issue of whether the Act exceeded Congress's authority under Section 2 of the Fifteenth Amendment. Rather, the Court was presented with a separate issue, namely, whether "requiring preclearance here would *tread on rights constitutionally reserved to the States*." *Lopez*, 525 U.S. at 282 (emphasis added). Given this issue, it is not surprising that the *Lopez* Court did not discuss the proper standard whether it be the "rationality" or "congruence and proportionality" standard for evaluating congressional power under Section 2 of the Fifteenth Amendment. Yet, the district court read this Court's silence as a direct rebuff

of *City of Boerne*'s "congruence and proportionality test" for cases arising under Section 2 of the Fifteenth Amendment. *Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 239. The *Lopez* Court was not presented with the issue raised here whether reauthorization of the Act exceeds Congress's power under Section 2 of the Fifteenth Amendment. Thus, the district court's reading of a *Lopez* "rationality" standard of review is unpersuasive.

Since *City of Boerne*, this Court has applied consistently the "congruence and proportionality" standard to resolve whether Congress has exceeded its Enforcement Clause power. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 519-34 (2004) (applying congruence and proportionality review to reject a challenge to provisions of the Americans with Disabilities Act); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-40 (2003) (applying congruence and proportionality review to reject a challenge to provisions of the Family and Medical Leave Act); *Garrett*, 531 U.S. at 372-74 (applying congruence and proportionality review to invalidate provisions of Title I of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81-91 (2000) (applying congruence and proportionality review to invalidate provisions of the Age Discrimination in Employment Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999) (applying congruence and proportionality review to invalidate provisions of the Patent and Plant Variety Protection Remedy Clarification Act).

Clearly, the congruence and proportionality standard is not different from the standard this Court applied in *Ex parte Virginia*, *Katzenbach*, *City of*

Boerne, or *Lane*. Congress's use of its enforcement power under the Fourteenth or Fifteenth Amendment is "appropriate" when it is "adapted to carry out the objects the amendments have in view." *Ex parte Virginia*, 100 U.S. at 345. In other words, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520.

II

THE REAUTHORIZED SECTION 5 OF THE VOTING RIGHTS ACT SHOULD BE DECLARED UNCONSTITUTIONAL BECAUSE IT IS NO LONGER JUSTIFIED BY CHANGED SOCIAL AND POLITICAL CONDITIONS

Amici urge this Court to invalidate Section 5 of the Voting Rights Act, because changes in the social and political landscape do not justify the application of its measures to the same jurisdictions for twenty-five more years. Today, even in the South, political and social conditions are far different from what they were forty years ago when certain state legislatures and county officials did whatever was necessary to ensure the continued disenfranchisement of black voters. Government action approaching such blatantly racist conduct could not even exist today given this country's growing shift to a color-blind society that just recently saw the election of our nation's first black President, the increasing intolerance for racism among most Americans, and the ever present scrutiny of news media. *See* Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 Geo. J.L. & Pub. Pol'y 41, 74 (2007) (describing decline of white racism).

The ultimate question this case presents is whether the reauthorized Section 5 is an invalid congressional act. The absence of government action aimed intentionally at disenfranchising minority voters, the sporadic emergence of voting problems evenly distributed between covered and noncovered jurisdictions, and the inability of Section 5 to remedy the voting problems of today have made Section 5 unconstitutional.

A. The Deplorable Government Conduct Which Once Justified Section 5's Extreme and Temporary Remedy Has Been Eradicated

Section 5 is a federally intrusive law that injects directly the federal government into the policy-making process at the state and local level. In extending Section 5, Congress simply assumed that covered jurisdictions remain mired in a discriminatory past. The measures provided by Section 5 were necessary in 1965, "because case-by-case adjudication of voting rights lawsuits proved incapable of reining in crafty Dixiecrat legislatures determined to deprive African Americans of their right to vote, regardless of what a federal court might order." Samuel Issacharoff, et al., *The Law of Democracy: Legal Structure of the Political Process* 546-47 (2d ed. 2002); *see* H.R. Rep. No. 89-439, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2440-41 (describing repeated delays in the judicial process).

Originally, Section 5's coverage was limited mainly to jurisdictions of the Deep South. The experience federal officials gained from enforcing the early voting rights statutes prior to 1965 allowed the framers of the Act to precisely identify which states and counties continuously and deliberately committed

Fifteenth Amendment violations. In the context of this "unremitting and ingenious defiance of the Constitution," it was possible to infer that any change in voting procedures that occurred in certain southern jurisdictions was for a discriminatory purpose. *See Katzenbach*, 383 U.S. at 309 (describing the "insidious and pervasive evil" in parts of the South). Those jurisdictions were all of Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and most counties in North Carolina. Hearings on H.R. 4249, Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 1st Sess. 92-93 (1969). Armed with this knowledge, the framers of the Act carefully crafted a triggering formula to make Section 5 apply to those states and jurisdictions. Thernstrom, *supra*, at 46, 49.

As a result, Section 5 of the Act "remains alone in American history in its intrusiveness on values of federalism and the unique and complicated procedures it requires of states and localities that want to change their laws." Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 How. L.J. 717, 718 (2006).

Today, however, the unconscionable and deliberate vote suppression tactics that were implemented by governments in the Deep South in 1965, and which were the sole justification for the temporary intrusiveness of Section 5, have been eradicated. The Jim Crow inspired barriers to voting, such as intentionally discriminatory literacy tests and poll taxes, are no longer in use, and the numbers of minority officeholders are at historically high levels, as are levels of minority electoral participation. Persily, *supra*, 49 How. L.J. at 719. Almost thirty years ago,

there were few black elected officials; the Democratic Party was the only political party in much of the South; voting was extremely polarized along racial lines; and major voting issues were multimember and at-large election structures that hindered black political representation. Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 Yale L.J. Pocket Part 148 (2007). Today there is robust two-party competition in the South; a significant number of black officials serve at all levels in states with large minority populations, with black elected state legislators making up 31 to 45% of all Democrat state legislators in the Deep South states of Alabama, Florida, Georgia, Louisiana, Mississippi, and South Carolina; multiethnic jurisdictions abound, rather than the old biracial districts of the South thirty years ago; and there has been a decline in polarized racial voting. *Id.* at 149.

However, the 2006 reauthorization of Section 5 fails to reflect *any* of these changes, *id.* at 149-50, and as a result, Section 5's coverage has become even more overinclusive and underinclusive since its last reauthorization in 1982. Persily, *supra*, 49 How. L.J. at 723. Those jurisdictions that were selected for coverage based upon voting statistics from 1975 or earlier are no longer the worst or most notorious offenders of minority voting rights. *Id.* at 723-24 (citing the National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005, A Report* (Feb. 2006)).[3] Thus, subjecting these jurisdictions to the continued coverage of Section 5 cannot logically be supported. *See id.*

[3] *Available at* http://www.votingrightsact.org/homepageimages/comreport_summary.pdf (last visited Feb. 23, 2009).

at 724 (discussing how renewal of Section 5's old coverage would leave the Act "incongruent" and "disproportionate"). For instance, Section 5 covers counties in New Hampshire and Michigan, but not the counties which experienced recent voting problems in Ohio and Florida. *Id.* at 723 (citing U.S. Dep't of Justice, Civil Rights Div., Voting Section Home Page, *Section 5 Covered Jurisdictions*).[4]

The reauthorization of Section 5's invasive scheme on the same jurisdictions for another 25 years is an act of political abdication, not responsibility. Pildes, *supra*, 117 Yale L.J. Pocket Part at 148. In extending Section 5 without altering its coverage, Congress failed to address difficult policy issues created by the changed social landscape, and locked Section 5 in place until the year 2031 in the hopes those issues will go away. *Id.* Congress made no concessions to the post 1982 *City of Boerne* doctrines, nor to the social, political, and institutional changes since 1982. *Id.* at 153. It is true that Congress held hearings prior to the 2006 reauthorization, but strangely those hearings had no effect on the content of the law. *Id.* at 151. It was as if the reauthorization legislation was drafted first, and then Congress simply marshaled one-sided evidence to support its conclusions rather than undertaking the difficult task of amending Section 5 to accommodate the changed circumstances since its last extension 25 years before.

[4] *Available at* http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Feb. 23, 2009).

B. The Evidence in the Legislative Record Fails to Support Section 5's Reauthorization

Since Section 5 continues to burden only certain jurisdictions, the reauthorization can only be justified on evidence showing how differences in minority voter discrimination exist between the covered and noncovered jurisdictions. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 195 (2007). The legislative record contains four categories of evidence in support of reauthorization: statistics as to minority voter turnout, registration, and rates of office holding; statistics concerning Department of Justice and jurisdiction behavior with respect to the preclearance process; examples of voting rights violations in covered jurisdictions; and data as to all nationwide litigation under Section 2 of the Act. *Id.* Upon examination, the evidence in these categories justifies the invalidation of Section 5, not its reauthorization.

For the first category, voter turnout statistics no longer justify the targeting of specific geographical areas for continuous and oppressive coverage. Turnout rates in the covered and noncovered jurisdictions do not differ significantly, and in some covered jurisdictions in California, Georgia, North Carolina, Mississippi, and Texas, the turnout of black voters exceeds that of white voters. *Id.* at 196-97 (citing S. Rep. No. 109-295, at 11 (2006)). These statistics do not quantify unconstitutional discrimination in either covered or noncovered jurisdictions. *See id.* at 197 (discussing how turnout statistics no longer capture the levels of unconstitutional discrimination that may exist). Moreover, there is not even a rational basis for

defending Section 5's coverage of certain counties, such as in Michigan and New Hampshire, which have no significant history of minority voting problems, but not the counties of Ohio and Florida where the most prominent voting rights issues in recent elections occurred. *See id.* at 208 (describing how Section 5's coverage is difficult to defend). In addition, the legislative record established a significant increase in the number of minorities in public office, but not whether there is a difference in rates of minorities holding office between covered and noncovered jurisdictions. *Id.* at 199 (citing David A. Bositis, Joint Ctr. for Political & Econ. Studies, *Black Elected Officials: A Statistical Summary* 16 (2001); Charles S. Bullock III & Ronald Keith Gaddie, *Focus on the Voting Rights Act: Good Intentions and Bad Social Science Meet in the Renewal of the Voting Rights Act*, 5 Geo. J.L. & Pub. Pol'y 1, 7 (2007)).

Section 5 requires covered jurisdictions to request preclearance from the federal government prior to instituting a change to an existing voting procedure. 42 U.S.C. § 1973c. A Department of Justice preclearance denial possibly signifies a voting rights violation, and a large number of voting rights violations would help justify the need for the continuation of Section 5. Rodriguez, *supra*, at 804; *but see* Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 Ohio St. L.J. 177, 190 (2005) (arguing that DOJ statistics are a poor indicator of intentional discrimination). But like voter turnout statistics, preclearance evidence does not support reauthorization. In the first five years after the enactment of the Act, the rate of Department of Justice

objections to preclearance requests was 4% per year. Persily, *supra*, 117 Yale L.J. at 199. In the last ten years there have only been 92 total preclearance objections, or 0.2% per year. *Id.* (citing *Modern Enforcement of the Voting Rights Act: Hearing on S. 2703 Before the S. Comm. on the Judiciary*, 109 Cong. 117 (2006) (statement of Wan J. Kim, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice)).

The evidence of voting rights violations limited to covered jurisdictions is similarly unhelpful. Charges of discrimination in voting practices are just as likely to occur in areas not covered by Section 5 as in jurisdictions that are covered. *See* Pildes, *supra*, 49 How. L.J. at 752-54 (describing cases of racially polarized voting in covered and noncovered jurisdictions). Today, the greatest majority of cases brought under the Act involve vote dilution claims which are not concentrated in any one part of the country and which are addressed through Section 2 of the Act nationwide. *Id.* at 753. Since 1990, the same number of Section 2 violations have occurred in Pennsylvania (a noncovered jurisdiction) as in South Carolina (a covered jurisdiction). *Id.* (citing Ellen Katz & the Voting Rights Initiative, *Documenting Discrimination in Voting Under Section 2 of the Voting Rights Act*, Voting Rights Initiative Database (2005)).[5] Even more Section 2 violations occurred in New York. *Id.* (citing Katz & the Voting Rights Initiative, *supra*). Of the twenty four reported cases since 1982 in which courts found intentional discriminatory voting practices, only eleven were from covered jurisdictions,

[5] *Available at* http://sitemaker.umich.edu/votingrights/files/violationlocations.pdf (last visited Feb. 23, 2009).

while thirteen were from noncovered jurisdictions. *Id.* at 754 (citing Katz & the Voting Rights Initiative, *supra*). One study contained in the Senate Report in support of the 2006 reauthorization analyzed published opinions in all lawsuits since 1982 involving Section 2 claims and found that slightly more than half of the cases were filed in noncovered jurisdictions. Persily, *supra*, 117 Yale L.J. at 203 (citing Ellen Katz, et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643, 654 (2006)).

Prior to 2006 reauthorization, legal scholars warned that if Congress left Section 5 unchanged, it would become increasingly difficult to account for the differences between jurisdictions covered and not covered in terms of addressing new specific areas of systematic minority voting-rights problems. Pildes, *supra*, 49 How. L.J. at 754; *see* Persily, *supra*, 117 Yale L.J. at 183 n.32 (describing testimony of Professors Richard Hasen, Samuel Issacharoff, Nathaniel Persily, and Richard Pildes in the Senate hearings prior to reauthorization). Congress's failure to change Section 5's coverage area thus raises serious questions about Section 5's constitutionality, because it no longer provides a remedy to areas currently having race-based voting rights problems.

C. Section 5 Does Not Provide a Remedy to Modern Voting Problems Impacting Minorities

Section 5 is based on the notion that the federal government can identify, in advance, regions of the country where minority voting rights violations are more likely to arise systematically than in other areas of the country. Pildes, *supra*, 49 How. L.J. at 748.

That is why Section 5 only applied to the limited jurisdictions where race-based discrimination in voting was prevalent at the time of the Act's enactment. Having been made applicable in only certain parts of the country, Section 5 is designed to address only changes in voting laws and procedures, but not the practices that are already in place. *Id.* at 751 (citing *Beer v. United States*, 425 U.S. 130 (1976)). This approach fails to address the kinds of voting problems more likely to plague minority voters today.

The old style and systemic, race-based discrimination that made the Act necessary in 1965 exists only sporadically, if at all, while new allegations of minority voting problems stem from issues motivated by partisan politics rather than racial prejudice. Persily, *supra*, 49 How. L.J. at 723. Modern voting problems from the 2000 and 2004 elections, which are not significantly different than those faced by nonminority voters, include: registration problems (caused by existing procedures, but distinct from discriminatory problems of the past), barriers to voting by registered voters (long lines, voter identification requirements, insufficient machines and ballots), provisional ballots, precinct maladministration, errors or fraud in vote tabulation, reliance on old voting technology, and poor ballot design. *Id.* at 720-21; *see* Pildes, *supra*, 49 How. L.J. at 750 (describing similar modern voting issues).

Current voting problems occur mainly through the failure to change voting procedures. For instance, voting technology issues arise through the reliance on old outdated voting machines brought about from the failure to change. *Id.* at 751-52. But Section 5 obstructs change by requiring all covered jurisdictions

to undergo a costly and burdensome administrative process in order to "preclear" its changes with the federal government. *Id.* at 752. This encourages jurisdictions to simply maintain their old voting procedures.

D. Application of Section 5's Old Style Remedy to Modern Voting Issues Obstructs the Development of the Minority Political Establishment

Section 5's intrusiveness deprives "local jurisdictions a customary range of political decisions including districting, terms of office, and electoral systems that were ordinarily subject to what Justice Souter would term the pulling and hauling of everyday politics." Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 Colum. L. Rev. 1710, 1712 (2004) (citing *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)). An inequity materializes in covered districts when Section 5 works to deprive black elected officials of the ability to engage in full political integration, and prevents the expansion of minority voter influence.

A striking example of how minorities are treated differently in covered versus noncovered jurisdictions is exemplified by comparing the outcome in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), with that of *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001). *Ashcroft* and *Bartels* both involved similar state redistricting efforts strongly supported by Democratic and black elected officials. *Ashcroft* involved redistricting in Georgia, a covered state, while *Bartels* involved redistricting in New Jersey, a noncovered state.

In *Bartels*, the New Jersey Apportionment Commission adopted a redistricting plan. The plan, supported by minorities, increased Democratic controlled districts by unpacking black voters from three districts where they had been the majority of voters and assigned them to a fourth district. *See Bartels*, 144 F. Supp. 2d at 354, 355 (describing support of the redistricting plan from Martin L. King III, of the Southern Christian Leadership Conference). This created four districts where black voters, though in the minority, were in a position to elect more preferred Democrat candidates through the aid of white cross-over voters and the building of multi-racial coalitions. Issacharoff, *supra*, 104 Colum. L. Rev. at 1723-24.

The plaintiffs challenging the redistricting in *Bartels* were seventy Republican members of the New Jersey legislature and a few minority voters. *Id.* at 1721. Since New Jersey is not a covered state, the plaintiffs brought a minority vote dilution claim under Section 2 of the Act, which applies nationwide. Under Section 2, the plaintiffs had to meet their initial burden by satisfying the three factors from *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), so that the district court could consider the "totality of the circumstances" when determining whether the redistricting violated the Act. Ultimately the three judge panel of the court approved the redistricting and concluded the minority-favored plan "will encourage franchise participation of New Jersey voters, including African-American and Hispanic voters," without diluting or impairing minority participation. *Bartels*, 144 F. Supp. 2d at 369.

Like *Bartels*, *Ashcroft* also involved a state redistricting plan supported by the Democratic and black political establishment. The purpose of the redistricting in *Ashcroft* was also to increase the number of elected Democratic politicians by unpacking the most heavily concentrated majority-minority districts to create new influence districts. *See Ashcroft*, 539 U.S. at 470-71 (describing the percentages of black voters in the old and new districts). The Georgia Senate narrowly approved the plan by a partisan vote, with ten of the eleven black Senators voting in support. *Id.* at 471. The plan also passed in the Georgia House of Representatives, where thirty-three of the thirty-four black Representatives voted in its favor. *Id.* No Republican Senators or Representatives voted in favor of the redistricting, *id.*, leaving no doubt that this was a Democratic plan with overwhelming support from black elected officials.

Because Georgia is a covered state, it had to first seek Section 5 preclearance from the Department of Justice or the District Court for the District of Columbia prior to implementing the redistricting plan. Under Section 5, no voting procedure changes can be made " 'that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.* at 477 (citations omitted). Unlike the district court in *Bartels*, which approved similar redistricting, the three judge district court panel in *Ashcroft* denied preclearance of the Georgia plan. The court held that Georgia failed in its burden to show that the redistricting would not have a retrogressive effect on black voters, because the percentages of black voters in majority-minority districts were decreased. *Id.* at 475.

The Georgia plan was not a measure imposed on black elected officials, because it received overwhelming minority support. Issacharoff, *supra*, 104 Colum. L. Rev. at 1716. Thus, the result of the district court decision was to obstruct the strategy of black elected officials who sought to exert a geographically broader influence in state politics. This Court vacated the judgment below in *Ashcroft* and remanded the case for further consideration in light of a new standard. *Ashcroft*, 539 U.S. at 491. But the 2006 Reauthorization overruled *Ashcroft*. 42 U.S.C. § 1973c(b); *see* Persily, *supra*, 117 Yale L.J. at 234 ("By adding the words 'ability . . . to elect' to the new section 5, Congress attempted to overrule [*Ashcroft*] and return the retrogression inquiry to what it was under the *Beer v. United States* standard.").

The end result in *Ashcroft* and *Bartels* is troublesome for at least two reasons. First, the outcomes are remarkably different. The redistricting was upheld in New Jersey, but denied in Georgia (at the district court level). Second, the result means that Section 5, which formerly afforded more protection to blacks in covered jurisdictions, now acts to impede the political progress of minorities. Section 5 has emerged as "a brake on black political aspirations in the heart of the Deep South." Issacharoff, *supra*, 104 Colum. L. Rev. at 1717.

As a result of Congress's refusal to address Section 5's coverage, modern voting issues, or preclearance requirements, Congress has in effect "thrown down a gauntlet to the Court" in a dare to take action. Pildes, *supra*, 117 Yale L.J. Pocket Part at 153. In the *City of Boerne* line of cases, this Court demands that Congress have evidence that its remedial

legislation is congruent and proportional to the constitutional aim it seeks to advance. The systemic discrimination of the Old South which justified the Act in 1965 is no longer prevalent, and can no longer serve to justify Section 5's extreme measures today. Similarly, modern voting problems are not tied to specific geographic locations, and are not amenable to resolution by Section 5 even if they were. By failing to justify Section 5's continued relevance through 2031, Congress has acted outside its enforcement powers.

♦

CONCLUSION

For the foregoing reasons, this Court should hold that the 2006 reauthorization of Section 5 of the Voting Rights Act is not a valid exercise of Congress's remedial powers under the Fifteenth Amendment.

DATED: February, 2009.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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(10)

No. 08-322

Supreme Court, U.S.
FILED
FEB 26 2009
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IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR NATHANIEL PERSILY, STEPHEN ANSOLABEHERE, AND CHARLES STEWART III AS *AMICI CURIAE* ON BEHALF OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*

Professor Nathaniel Persily, Professor Stephen Ansolabehere, and Professor Charles Stewart III are political scientists who have written extensively on American politics and the regulation of elections.[1] They take an interest in this case because they often serve as consultants in matters of redistricting and election reform governed by the Voting Rights Act (VRA). Professor Persily is the Charles Keller Beekman Professor of Law and Political Science at Columbia Law School. He has been called upon, particularly by courts, to draw redistricting plans for jurisdictions that are both covered and not covered by section 5 of the Voting Rights Act. *See Larios v. Cox*, 314 F. Supp. 2d 1357 (N.D. Ga. 2004); *In re Legislative Redistricting of State*, 805 A.2d 292 (Md. 2002); *Rodriguez v. Pataki*, 2002 WL 1058054 (S.D.N.Y. May 24, 2002). Professor Ansolabehere is Professor of Government at Harvard University. Professor Stewart is the Kenan Sahin Distinguished Professor of Political Science and Head of the Political Science Department at the Massachusetts Institute of Technology. Professors Ansolabehere and Stewart led the Caltech-MIT Voting Technology project following the 2000 election and,

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief. All parties, other than the Attorney General of the United States have filed written consents. The written consent for the United States is being submitted herewith.

along with Professor Persily, have remained actively involved in election reform projects at the state and federal level.

Amici also take a particular interest in this case because of their ongoing research concerning race and voting in American elections. *Amici* have analyzed the exit polls and results from recent elections with an eye toward assessing any changes in voting patterns among racial groups. Because the existence and extent of such changes in the covered and noncovered jurisdictions have become part of the debate over Section 5 of the VRA, *amici* believe their research might be of use to the Court in this case.

Amici submit this brief on behalf of neither party in this case with the limited goal of providing the Court with presidential election data that might be relevant to arguments made by the parties. *Amici* take no position on the statutory or constitutional issues involved in this case.

SUMMARY OF ARGUMENT

The election of an African American as president of the United States was inconceivable at the time of the passage of the original Voting Rights Act (VRA) and remained an unlikely possibility even at the time of the 2006 reauthorization. It is no surprise, then, that the election of President Barack Obama has led some to question the continued utility and relevance of Section 5 of the Voting Rights Act. In particular, critics view the broad interracial coalition of support that aided in his victory as demonstrating a fundamental alteration in

historic patterns of race and political preference. *See* Br. for Appellants at 3. The data from the 2008 election, however, do not indicate a profound disruption in the well-known correlations between race and vote choice.

The gap in candidate preferences between white and minority voters grew in 2008, as did the gap between the jurisdictions' covered and not covered by Section 5 of the VRA. Specifically, President Obama's victory derived from an increase in his share of the white vote in the noncovered jurisdictions and a nationwide increase in his share of the vote cast by racial minorities. Whites in the covered jurisdictions did not cross over in significant numbers to vote for Obama. In several of the covered states, he did worse among white voters than the Democratic nominee four years earlier. Despite a nationwide Democratic swing and an increase of approximately three percentage points in the share of the white vote nationwide, Obama won only one fully covered state (Virginia).

Far from suggesting a break with the voting patterns of the past, the 2008 election revealed the intransigence of racial differences in voting patterns. Whites and racial minorities in the covered jurisdictions, then as now, tend to favor different candidates at the polls. Moreover, whites of every partisan affiliation in the covered jurisdictions were less likely to vote for Obama than were their copartisans in the noncovered jurisdictions. Even when controlling for vote choice in the 2004 election, the racial composition of jurisdictions remains a statistically significant factor in explaining voting preferences in 2008. Indeed, in 2008 race played a greater role in vote choice in the covered than in the noncovered jurisdictions.

ARGUMENT

I. The Results of the 2008 Election Do Not Indicate Any Substantial Disruption in Historical or Geographic Patterns of Race and Political Preference.

Among the other findings it made to justify retaining coverage for certain jurisdictions under the Voting Rights Act, Congress found that "The continued evidence of racially polarized voting in each of the [covered] jurisdictions . . . demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965." *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(3), 120 Stat. 577. Such a finding was based on testimony the House and Senate Judiciary Committees heard suggesting that, due to the interaction of racially divergent voting patterns and certain electoral structures, minorities in the covered jurisdictions are less likely to elect their preferred candidates. *See, e.g., Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Congress 49 (2005) (testimony of Richard Engstrom); *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 14, 26 (2006) (testimony of Theodore S. Arrington); *id.* at 48 (testimony of Anita Earls). Congress focused on state and local elections given the prevalence of Section 5 activity at smaller levels of government and the greater ease of measuring racial differences in voting

in such elections. With respect to those elections, Congress found that, in the covered jurisdictions, whites and racial minorities tend to favor different candidates at the polls.

Because of the unprecedented and, until recently, highly improbable election of an African American as President, questions have naturally arisen as to whether racial differences in voting patterns have diminished. More specifically, if such changes have taken place, among which voters and in which states has the racial gap in voter preferences narrowed? In particular, do the results of the 2008 election indicate profound changes in the voting preferences of whites in the covered jurisdictions or at least, a lower correlation there between race and vote choice?

Contrary to the view that Obama's victory arose from a nationally uniform and widespread interracial coalition, the data suggest persistent geographic and racial differences in the 2008 election. In particular, Obama only made gains relative to 2004 among whites in the noncovered jurisdictions and among racial minorities nationwide. The result has been a widening of the gap in political preferences between racial groups and a greater differentiation between the covered and noncovered jurisdictions.

A. Presidential Election Exit Polls from 2004 and 2008 Do Not Indicate a Reduction in the Political Differences Between Minorities and Whites in the Covered Jurisdictions.

Data from presidential election exit polls in 2004 and 2008 reveal, if anything, an increase in the differences between whites and minorities in the covered jurisdictions. This is due both to the relative reluctance of whites to vote for Barack Obama and to the increased cohesion among minority voters. The data also point to growing differences between the covered and noncovered jurisdictions concerning the relationship between race and candidate preference.

Table 1 presents the exit poll results from the covered and noncovered states. For purposes of this analysis and because exit poll samples are only available and reliable (if at all) at the state level, we count as "covered states" only those states that the Department of Justice designates as "covered" on its website. See Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.php (listing as covered states: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia). Although fifteen political subdivisions in Virginia have bailed out of coverage, we follow the DOJ's practice and include Virginia as a "covered state."[2] The remaining

[2] Doing so, if anything, reduces the differences among racial groups in the covered jurisdictions, since the gap between whites and minorities in Virginia has been smaller than the average covered state.

states we designate as "noncovered states", even though some of those states contain municipalities that are covered.[3] In the Appendix we separate out each category of jurisdiction, depending on whether it has any covered municipalities or not. Moreover, the regressions of election results, discussed later, largely avoid this categorization problem by grouping all covered counties together.

The largest changes in voting in the covered jurisdictions appear from the exit polls to have occurred among African American and Latino respondents. Obama received 11 percentage points more of the Black vote than did John Kerry in 2004, to achieve near unanimity (97 percent) among African American respondents. His percentage among Latinos also appeared to increase (13 percentage points) to 62 percent. In stark contrast, he appeared to make no gains among white respondents in the covered jurisdictions. Only 26 percent of whites in the covered jurisdictions reported voting for Obama, the same percentage received by John Kerry in 2004. The result was a widening of the gap between African Americans and whites to 71 percentage points and between Latinos and whites to 36 percentage points.

[3] We do so because, in the noncovered states with covered municipalities, only a minority of the population – in most such states, a very small minority – is actually covered. North Carolina is the partially covered state with the greatest share (36 percent) of its population covered. New York is second with 28 percent of its population covered. In all other partially covered states, the share of the state's population that is covered is negligible.

Table 1. Reported vote by racial groups in 2004 and 2008 Presidential elections, national exit polls[4]

	Covered States		Noncovered States	
Group	2008 (%)	Change from 2004	2008 (%)	Change from 2004
White	26	0	48	4**
Black	97	11**	95	10**
Latino	62	13**	69	9**
Whites				
Democrats	76	–5**	86	1
Republicans	4	1**	10	3**
Independents	31	–2	50	0
Difference				
Black-white	71	11**	47	6**
Latino-white	36	13**	21	5**

**p<.01

The story is somewhat different for the noncovered jurisdictions where, compared to the Democratic

[4] The source for the 2004 exit poll data is National Election Pool, Edison Media Research, & Mitofsky International, *National Election Pool General Election Exit Polls, 2004, available at* http://dx.doi.org/10.3886/ICPSR04181 (dataset excludes South Dakota). The source for the 2008 exit poll data is MSNBC, Politics, 2008 Results, Exit Polls, http://www.msnbc.msn.com/id/26843704.

nominee in 2004, Obama appeared to post gains among respondents from all racial groups. The gains among minority voters were still larger (10 points among African Americans and 9 points among Latinos) than the gains among whites (4 points). However, Obama's share of the white vote in the noncovered states (48 percent) was over twenty points larger than that in the covered states (26 percent), and appears to have occurred among white respondents from all partisan subgroups. At the same time, the exit polls suggest that he received about the same share of the African American vote (95 percent) and a somewhat larger share of the Latino vote (69 percent versus 62 percent) in the noncovered jurisdictions. A substantial gap in reported voting preferences between racial groups exists in the noncovered jurisdictions, as well, but the gap is noticeably smaller than that in the covered jurisdictions. The difference between African Americans and whites was 47 percentage points, and the difference between Latinos and whites was 21 percentage points.

Because the reliability of exit polls depends on their sampling design and a host of other factors, caution is warranted in overinterpreting the differences between the 2004 and 2008 exit polls. One can note with confidence that large and statistically significant differences between racial groups existed in the covered jurisdictions in 2008, and that the differences between whites in the covered and noncovered jurisdictions reach conventional levels of statistical significance. However, to understand what is happening in each category of jurisdictions one must dig deeper into the data.

Because averaging all of the covered states together may obscure variations between them, Table 2 presents the exit poll data for all fifty states. The states are placed in the order from lowest to highest in terms of the share of white voters reporting that they voted for Obama. The six states with the lowest percentages of white respondents who reported voting for Obama are covered states. Three of those states (Alabama, Mississippi, and Louisiana) reported a drop in the white vote for the Democratic nominee since 2004. All of the covered states are below the national share of the reported white vote received by Obama.

It should also be noted that the five states that report the lowest levels of white voting for Obama and the largest gap between whites and African Americans in terms of Obama's reported vote share are also the states with some of the largest African American population shares. These five states are among the top six states in terms of the share of the population that is African American. According to the 2006 Census population estimates, Mississippi (37 percent), Louisiana (32 percent), Georgia (30 percent), Maryland (29 percent), South Carolina (29 percent), and Alabama (26 percent) have the highest African American population shares of any state. *See* U.S. Census Bureau, State Population Estimates-Characteristics, available at http://www.census.gov/popest/states/asrh/SC-EST2006-03.html . All but Maryland are covered by Section 5 of the Voting Rights Act.

Table 2. Racial breakdown of Obama support by state, 2008 exit polls.[5]

State	% of Whites Voting for Obama	Change in White Vote-share from 2004	% of White Demo-crats Voting for Obama	% of Blacks Voting for Obama
Alabama	10	–9**	47	98
Mississippi	11	–3	NA	98
Louisiana	14	–10**	38	94
Georgia	23	0	78	98
South Carolina	26	4*	80	96
Texas	26	1	78	98
Oklahoma	29	1	59	NA
Arkansas	30	–6**	68	95
Utah	31	7**	NA	NA
Wyoming	32	4	80	NA
Alaska	33	1	86	NA
Idaho	33	4	89	NA
Tennessee	34	0	79	94
North Carolina	35	8**	83	95
Kentucky	36	2	62	90
Nebraska	39	6**	83	NA
Virginia	39	7**	86	92
Arizona	40	0	83	NA
Kansas	40	6*	85	NA
South Dakota	41	4*	82	NA

[5] *p<.05, **p<.01. The sources for the 2004 and 2008 exit poll data are provided in note 4 *supra*. Covered states are indicated in bold, partially covered states are underlined. "NA" indicates that due to small sample sizes cell entries are not available.

West Virginia	41	-1	69	NA
Florida	42	1	81	96
Missouri	42	0	84	93
New Mexico	42	-1	85	NA
North Dakota	42	7**	90	NA
United States	*43*	*3***	*85*	*95*
Indiana	45	11**	86	90
Montana	45	7**	91	NA
Nevada	45	2	90	94
Ohio	46	3	85	97
Maryland	47	3	83	94
Penn-sylvania	48	3	85	95
New Jersey	49	3	85	92
Colorado	50	9**	95	NA
Connecticut	51	1	86	93
Illinois	51	3	86	96
Iowa	51	3*	93	93
Michigan	51	8**	91	97
California	52	5**	91	94
New York	52	4	85	100
Delaware	53	9**	86	99
Minnesota	53	3*	94	NA
New Hampshire	54	4**	92	NA
Wisconsin	54	7**	95	91
Washington	55	4*	95	NA
Oregon	57	8**	92	NA
Maine	58	5**	89	NA
Rhode Island	58	1	89	NA
Mass-achusetts	59	1	86	NA
Vermont	68	11**	96	NA
Hawaii	70	12**	96	NA
DC	86	6	97	97

B. The 2004 and 2008 Presidential Election Results at the County Level Do Not Indicate a Reduction in the Political Differences Between Minorities and Whites in the Covered Jurisdictions.

The inferences drawn from the exit polls are confirmed by an analysis of the county-level results for the 2004 and 2008 presidential elections. Such data have the added virtue of generating a more comprehensive description of all covered counties, not just covered states. They also allow for a more accurate assessment of the racial composition of each class of jurisdictions, because the census includes a richer description of the race of the covered and noncovered populations. The large number of counties, moreover, should generate greater confidence in some of the differences among racial groups toward which the exit polls may have hinted.

Table 3 presents the data analysis that is graphically depicted in Figure A. The analysis consists of using linear regression to predict the county vote for Barack Obama in 2008, as a function of the combined Black and Hispanic population share in each county. The analysis is run separately for covered and noncovered counties. The county demographic data come from Census Bureau estimates as of 2006.[6] County level election results come from the websites of each state's chief elections official.[7] Every county covered by the Voting

[6] Bureau of the Census, *State and County Quickfacts*, *available at* http://quickfacts.census.gov/qfd/index.html.

[7] The one exception is Massachusetts, for which results from the *USA Today* website were used. That state has not yet released official results from the 2008 election.

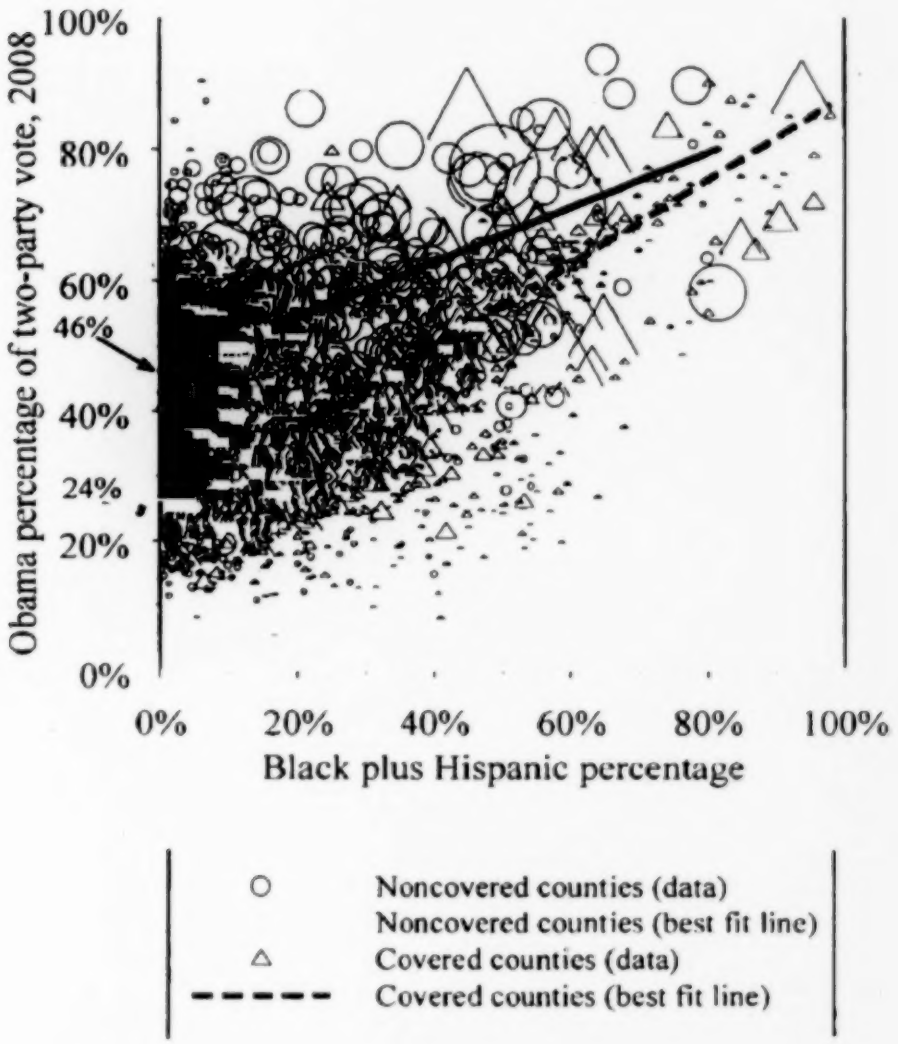
Rights Act is considered a "covered county" in this analysis. Noncovered counties that contain covered townships are considered not to be covered in this analysis, because the covered townships comprise a very small percentage (never more than nine percent) of the population of these counties. Treating these counties as covered does not change the results in any meaningful way, however. Because Alaska does not release election results at the county level, the state of Alaska is considered one large county for purposes of the regression analysis throughout this brief. Adding or subtracting Alaska from the regressions or analysis does not change the results in any meaningful way. In the analysis that follows, each observation (county) is weighted by the number of total votes cast in the county in the 2008 presidential election. In the graph that illustrates the analysis, the size of the triangles and circles are proportional to the number of votes cast.

Table 3. Regression predicting the two-party vote for Barack Obama in the 2008 presidential election at the county level.

	Covered counties	Noncovered counties
Combined Black and Hispanic Percentage of County	0.635***	0.415***
	(0.022)	(0.013)
Intercept	0.244***	0.461***
	(0.009)	(0.004)
N	860	2,254
R^2	.496	.307

***p<.001. Numbers in parentheses are standard errors.

Figure A. Relationship between 2008 presidential vote and Black and Hispanic population share, covered and noncovered counties.



The most important statistic derived from this analysis is the y-intercept for each of the regression lines. These intercepts are labeled on Figure A. Because

the y-intercept is the predicted fraction of the vote cast for Barack Obama in counties with no African Americans or Hispanics, the intercept provides an independent estimate of the percentage of white voters[8] who voted for the minority-preferred candidate in 2004.

As with the exit polls, the regressions indicate a lower share of whites in the covered jurisdictions willing to vote for the general election candidate preferred by African Americans and Hispanics. The y-intercept in the regressions suggests that, in covered counties without any Africans Americans or Hispanics, 24 percent of the population voted for Obama. In contrast, the regressions reveal that about 46 percent of voters in the noncovered counties with no African Americans or Hispanics voted for Obama. By this estimate, the largely white noncovered counties differed from the largely white covered counties in their support for Barack Obama by 22 percentage points.

The slope of the regression is also an important indicator of the divergence between whites and minorities in their voting patterns. The steeper the slope, the more that counties differ from each other based on their racial makeup. In 2008, the slope of the relationship is 0.635 in covered jurisdictions, which is consistent with an estimate that counties that were 100 percent African American and Hispanic would differ by 63.5 percentage points from counties without any African Americans or Hispanics in their level of support

[8] It may perhaps be more accurate to say voters who are neither Black nor Hispanic.

for Obama. In contrast, the slope of the relationship is only 0.415 in the noncovered jurisdictions.

As the exit polls suggested, partisanship does not explain away the differences between the covered and noncovered jurisdictions. In fact, even when one controls for a county's previous voting history, its racial composition remains a statistically significant variable in predicting Obama's share of the county vote. Table 4 presents a multivariate regression with the dependent variable being the difference between Obama and Kerry's voteshare in a county. As the coefficients demonstrate, the white percentage of the county has a statistically significant negative relationship to Obama's gain in voteshare over 2004. This relationship is twice as large (-0.111 versus -0.047) for the covered jurisdictions than the noncovered jurisdictions. In other words, even when one controls for past vote for the Democratic presidential nominee, the effect of race on vote choice remains, as does the greater influence of race in the covered jurisdictions.

Table 4. Regression predicting the difference in county-based election results for Democratic candidate in 2008 and 2004.

	Covered	Noncovered
Percentage of county population that is white	-0.111***	-0.047***
	(0.009)	(0.004)
Intercept	0.111***	0.086***
	(0.005)	(0.003)
N	860	2,254
R^2	.159	.06

***p<.001. Standard errors in parentheses.

CONCLUSION

For scholars of election law and the Voting Rights Act, the unprecedented 2008 election provided a unique opportunity to evaluate whether well-known patterns concerning race and vote choice had changed in a fundamental way. The data from the 2008 election do not suggest any such deep structural changes in voting behavior. Most of the movement between 2004 and 2008 occurred among nonwhites, who voted in greater numbers for Obama. Any added voteshare for Obama among whites occurred principally in the noncovered jurisdictions. The gaps between racial groups in the covered jurisdictions appeared, in fact, to grow in 2008.

None of this is to take away from the historical significance of the 2008 election. Indeed, the unprecedented result is a testament to how far the nation has come since the Voting Rights Act was first passed. Progress with respect to the diminution of racial differences in voting has been uneven, however. The data from this historic election do not provide evidence of substantial change in the geography of racially differential voting patterns.

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APPENDIX

APPENDIX

Support for Barack Obama by Racial Group, 2008 Presidential Election, National Exit Polls.[9]

Group	Covered States	Non-covered States with Covered Areas	Totally Non-covered States	Non-covered + partially covered
White	26	48	47	48
Black	97	96	94	95
Latino	62	68	71	69
Whites				
Democrats	76	87	86	86
Republicans	4	10	10	10
Independents	31	49	50	50
Polarization				
Black-White	71	48	47	47
Latino-White	36	20	24	21

9. Source for data cited in note 4 *supra*.

AMICUS CURIAE BRIEF

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Supreme Court, U.S.
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(9)

No. 08-322

In the Supreme Court of the United States

♦

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,
Appellant,
v.
ERIC H. HOLDER, Jr., Attorney General of the United States of America, *et al.*,
Appellees.

♦

On Appeal from the United States District Court for the District of Columbia

♦

BRIEF OF THE HONORABLE BOB RILEY, GOVERNOR OF THE STATE OF ALABAMA, AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

♦

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QUESTIONS PRESENTED

1. Whether §4(a) of the Voting Rights Act, which permits "political subdivisions" of a State covered by §5's requirement that certain jurisdictions preclear changes affecting voting with the federal government to bail out of §5 coverage if they can establish a ten-year history of compliance with the VRA, must be available to any political subunit of a covered State when the Court's precedent requires "political subdivision" to be given its ordinary meaning throughout most of the VRA and no statutory text abrogates that interpretation with respect to §4(a).

2. Whether, under the Court's consistent jurisprudence requiring that remedial legislation be congruent and proportional to substantive constitutional guarantees, the 2006 enactment of the §5 preclearance requirement can be applied as a valid exercise of Congress's remedial powers under the Reconstruction Amendments when that enactment was founded on a congressional record demonstrating no evidence of a persisting pattern of attempts to evade court enforcement of voting rights guarantees in jurisdictions covered only on the basis of data 35 or more years old, or even when considered under a purportedly less stringent rational-basis standard.

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BRIEF OF THE HONORABLE BOB RILEY, GOVERNOR OF THE STATE OF ALABAMA[1]

INTEREST OF AMICUS CURIAE

Since Governor Riley assumed office in January 2003, Alabama and its political subdivisions have submitted more than 2,300 voting-related changes for preclearance under §5 of the Voting Rights Act and sustained only one objection. Additionally, the Governor has twice battled §5 litigation, at significant taxpayer expense, after appointing an African-American to a vacant county commission seat in a majority-minority district. *See Riley v. Plump*, 555 U.S. , 129 S. Ct. 98 (2008) (mem.); *Riley v. Kennedy*, 553 U.S. , 128 S. Ct. 1970 (2008).

While Governor Riley takes no position on the legal questions raised by Appellant, J.S. at i, as Alabama's chief executive, he has an interest in two related issues:

1. *Alabama's Progress*: By renewing Alabama's coverage in 2006, Congress wrongly equated Alabama's modern government, and its people, with their Jim Crow ancestors. To rectify this error, Governor Riley chronicles Alabama's progress in minority voting rights from 1965, when §5 was created, through today.

[1]The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The Governor's brief was funded by the State of Alabama.

2. *Section 5's Burden*: Congress also failed in 2006 to analyze the variety of burdens that §5 imposes on a fully-covered state. To fill this void, Governor Riley presents seven stories describing Alabama's dealings with §5 during the Governor's six years in office.

SUMMARY OF THE ARGUMENT

1. Alabama earned its spot on §5's original coverage list. Through acts of violence and willful defiance of federal law, Alabama maintained an all-white Legislature and 19% black voter registration rate in 1965. When Congress renewed §5 ten years later, Alabama's progress had been minimal. The gap between black and white voter registration languished at 23.6%, and African-Americans composed only 10.7% of Alabama's Legislature, despite constituting nearly a quarter of its population.

But that was 34 years ago. When Congress renewed §5 in 2006, Alabama had exceeded the national average in minority registration and voting 16 straight years. Black and white Alabamians registered at virtually identical rates (72.9% and 73.8% respectively), and black Alabamians outvoted white Alabamians in the 2004 general election. African-Americans composed 25% of Alabama's Legislature, a figure that squarely reflected Alabama's 24.5% black population. And the number of black elected officials at all levels of Alabama government had increased nearly five-fold since 1975.

As importantly, Alabama's governments had shed their systematic defiance of federal civil rights law. The Department of Justice ("USDOJ") had not objected to a statewide preclearance submission from Alabama in 12 years. In fact, in the decade leading up to §5's fourth renewal (1996-2005), USDOJ objected to only two of Alabama's 3,279 preclearance submissions from *all* levels of government—a scant 0.06%. Simply put, when it came to honoring the Fifteenth Amendment, Alabama was no longer its grandfather's state.

2. Section 5 is the most intrusive remedy in the Congressional arsenal. From watching DVDs of Alabama's deliberative process, to second-guessing state supreme court decisions on purely state law questions, §5 injects the federal government into the heart of Alabama's government.

During his six years in office, Governor Riley has witnessed and sometimes experienced first-hand a variety of ways that §5 burdens Alabama:

- Section 5's preclearance process has impeded implementation of necessary and clearly non-discriminatory voting-related changes for more than a year;

- Political factions have used §5 to impede implementation of unfavorable outcomes in the state legislative and judicial processes;

- Section 5 makes implementing federally-mandated voting changes unnecessarily taxing; and,

- Section 5 handicaps, and may even prevent, Alabama from making the same non-discriminatory changes made by non-covered states.

Each of these burdens, while unique, shares a common thread: Its costs are borne by all Alabama citizens.

ARGUMENT

I. ALABAMA HAS PROGRESSED SIGNIFICANTLY SINCE 1965 AND 1975.

Alabama has shed its abysmal voting rights record of the 1960's. Today, black and white Alabamians register and vote at virtually identical rates, and Alabama's minority voter registration rate has exceeded the national average in every year since 1990. App. 17a-19a.[2] Furthermore, African-Americans comprise approximately 25% of Alabama's population, approximately 25% of its legislature, and more than 30% of its government workforce. App. 22a; *United States v. Flowers*, 444 F.Supp.2d 1192, 1193 (M.D. Ala. 2006).

Alabama's citizenry has similarly transformed. In 2005, 61% of Alabamians were under the age of 45; meaning that nearly two-thirds of Alabama's population was either in daycare or yet to be born when §5 was created. *Interim Projections*

[2]*See* Charles S. Bullock, III & Richard Keith Gaddie, *An Assessment of Voting Rights Progress in Alabama*, Tables 2-5 (2005) *available at* http://www.aei.org/docLib/20060505_VRAAlabamastudy.pdf.

of the Population by Selected Age Groups for the United States and States, U.S. Census Bureau, *available at* http://www.census.gov/population/projections/SummaryTabB1.pdf (last visited Feb. 26, 2009). By 2025 six years before §5 is set to expire the same demographic is projected to reach 80%. *Id.*

One question facing the Court is whether §5's 25-year renewal is a "congruent and proportional" response to the modern state of minority suffrage in covered jurisdictions like Alabama. J.S. at i. When it last addressed §5's constitutionality after the 1975 renewal, the Court agreed with Congress that §5 was still necessary, and thus constitutional, due to insufficient progress in the following three areas:

1. Racial disparities in registration and voting;
2. Minority participation in state government, especially in the state legislature; and,
3. The state's history of §5 preclearance submissions and objections.

See City of Rome v. United States, 446 U.S. 156, 180-81 (1980). Using the *City of Rome* factors as guides, Governor Riley chronicles Alabama's progress from 1965 and 1975, when the Court deemed §5 a constitutional response to contemporary times, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *City of Rome*, *supra*, to 2006, when Congress re-authorized §5 for another generation.[3]

[3]The district court used the 1975 Congressional Record as the benchmark for judging covered states' progress by 2006. J.S. App. at 58, 112-16.

A. ALABAMA: 1965

> *"Even after apparent defeat, resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods."*
>
> - House Report (1965)[4]

Section 5's preclearance requirement was Congress's extraordinary response to an extraordinary problem: gamesmanship of federal litigation. For nearly a decade, Southern officials frustrated the Civil Rights Acts of 1957, 1960, and 1964 by treating federal litigation like a "game of whac-a-mole," popping up new discriminatory devices each time the federal courts beat an old one down. Transcript of Oral Argument at 47, *Riley v. Kennedy*, 128 S. Ct. 1970 (2007) (argument by Pamela S. Karlan); *see also Beer v. United States*, 425 U.S. 130, 140 (1976) ("Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down."). Not only was Alabama involved, it provided Congress's primary example. *See* H.R. Rep. No. 89-439, at 5-6 (1965); S. Rep. No. 89-162, at 5-6 (1965).

In 1961, only 156 of 15,000 voting-age African-Americans in Dallas County, Alabama were registered to vote.[5] S. Rep. No. 89-162, at 6 (1965). To ameliorate the situation, the United States sued the county registrars for violating the Civil Rights

[4]H.R. Rep. No. 89-439, at 5 (1965).

[5]Selma, the site of "Bloody Sunday," is located in Dallas County.

Act. *Id.* But while the case was pending, Dallas County switched registrars, thereby forcing the district court to deny injunctive relief because the new registrars were untainted. *Id.*

The court of appeals eventually reversed and issued an injunction, but the gamesmanship continued. *Id.* The new registrars soon defied the court's order themselves by heightening the county's application standards. *Id.* This prompted the United States to file yet another lawsuit. *Id.* While this new case proceeded, Alabama one-upped the system again by implementing two new, statewide "literacy and knowledge of government tests." *Id.* at 7. In February 1965, the federal court issued an order banning the state's newest tests. *Id.* But after four years of litigation, minority registration in Dallas County rose only from 1% to 3%.[6] *Id.*

This rampant defiance of federal law led not only to §5's creation, but also to the paltry numbers Congress faced when placing Alabama under §5's coverage. In 1964, only 19.4% of eligible black Alabamians were registered to vote, H.R. Rep. No. 89-439, at 5 (1965), while 69.3% of white Alabamians were registered, S. Rep. No. 94-295, at 6 (1975), creating a 49.9% registration gap. Not surprisingly, no African-Americans served in Alabama's Legislature. App. 22a.

[6]Dallas County officials were not alone in their defiance of federal court orders. The 1965 Senate Report also details three years of gamesmanship by Perry County, Alabama officials, which ensured minority registration rates in the single digits. *See* S. Rep. No. 89-162, at 7-8.

B. ALABAMA: 1975

> *"The nature of [the VRA's] progress has been limited. It has been modest and spotty in so far as the continuing and significant deficiencies yet existing in minority registration and political participation."*
>
> - Senate Report (1975)[7]

While many things had changed in Alabama by 1975, its government was slow to follow suit. The Governor and 10 state legislators remained in their respective 1965 positions. *Compare* Ala. S. Journ. 2136-2142 (1965) *with* Ala. S. Journ. 3753-3765 (1975). Only two African-Americans served in the state senate (5.7%) and thirteen served in the house (12.3%). App. 22a. The total number of elected black officials statewide had climbed, but only to 161. App. 20a.

Minority advancement in appointed government positions fared no better. In 1968, the United States sued Alabama's State Personnel Board and the heads of several state agencies for discriminatory hiring and promotion practices that resulted in (1) 49 black applicants being passed over by "lower-ranking white applicants" and (2) 94 of 3077 government jobs (3.1%) being held by African-Americans. *See United States v. Frazer*, 317 F. Supp. 1079, 1086-87 (M.D. Ala. 1970). This litigation resulted in a comprehensive injunction on state hiring practices that, by 1976, extended to virtually all state agencies. *See United States v. Frazer*, No. 2709-N, 1976 WL 729 (M.D. Ala. 1976).

[7]S. Rep. No. 94-295, at 7-8 (1975).

Alabama's preclearance history and registration rates showed more promise. In §5's first decade, Alabama submitted 331 voting changes for §5 preclearance and received 22 objections (6.6%). *See* S. Rep. No. 94-295, at 16 (1975). During the same time period, black voter registration rose from 19.3% to 57.1%. *See id.* at 14. Yet, the gap between black and white voter registration languished at 23.6%. *Id.* at 13.

Based on this record, Congress's assessment of §5's continued need, at least with respect to Alabama, was understandable: "[A] 7-year extension of the Act was necessary to preserve the 'limited and fragile' achievements of the [VRA] and to promote further amelioration of voting discrimination." *City of Rome*, 446 U.S. at 182. But that was 34 years ago.

C. ALABAMA: 2006 AND TODAY

> *"Being an African-American just doesn't matter. I think it's a historical moment because we were given an opportunity to run."*
>
> -Representative James Fields[8]

James Fields recently violated a core tenet of §5's renewal: "The only chance minority candidates have to be successful are in districts in which minority voters control the elections." H.R. Rep. 109-478, at 34 (2006). On January 28, 2008, Fields, an African-American, was elected to represent a

[8]David Lazenby & Brittany Woodby, *Fields Gets Historic Win*, The Cullman Times, Jan. 30, 2008, *available at* http://www.cullmantimes.com/homepage/local_story_029111149.html?keyword=leadpicturestory (last visited Feb. 26, 2009).

majority-white district. *See* Adam Nossiter, *Race Matters Less in Politics of South*, N.Y. Times, (Feb. 21, 2008) *available at* www.nytimes.com/politics (search politics for "race matters less") (last visited Feb. 26, 2009). And not just any white district. Fields won 59.34% of the vote in Cullman, Alabama, a district whose voting populace is 96% white and 1% black.[9] Days later, Representative Fields joined Alabama's modern, integrated government.

Gone is Alabama's all-white legislature. When Congress re-authorized §5 in 2006, African-Americans composed 25% of Alabama's legislature (22.86% of the Senate; 25.71% of the House), a figure in line with Alabama's 24.5% African-American population. *See* S. Rep. No. 109-295, at 12 (2006). Similar advances have been made at the local level. Since 1975, the number of elected black officials increased nearly five-fold, from 161 to 756. App. 21a-22a.

Gone, too, is the thin representation of African-Americans in other areas of Alabama's government. For example, the Court has twice seen Governor Riley's commitment to appointing African-American county commissioners in majority-minority districts. *See infra* at 27-29. And in May 2003, the United States and Alabama jointly sought the termination of the 1970 *Frazer* injunction described *supra* at 8 because "the racial make-up of Alabama's government [was] dramatically different from what it was in 1970." *Flowers*, 444 F.Supp.2d at 1193. The "dramatic[] difference" was this: As of 2003, African-Americans constituted 39% of Alabama's

[9] *See fn.* 8.

government workforce, a figure approximately 15% greater than their representation in the general population. *Id.*

Alabama's modern governments have shown a great commitment to minority voting rights. The Department of Justice ("USDOJ") has not objected to a state-wide preclearance submission from Alabama in more than 14 years. App. 15a-16a. In fact, in the 10 years preceding the 2006 reauthorization, USDOJ lodged objections to a scant 0.06% (2 out of 3279) of Alabama's preclearance submissions from *all* levels of government: state, county, and municipal. *See id.*; App. 1a-14a (tracking the total number of §5 submissions from all jurisdictions from 1990 to 2008).[10] Furthermore, despite an exponential increase in Alabama's submissions, USDOJ objected to fewer Alabama submissions between 1982 and 2005 (45) than it did between 1965 and 1982 (59).[11] H.R. Rep. No. 109-478, at 73 (2006);

[10]The Governor attaches USDOJ's chart of every objection from Alabama between 1994 and 2006. App. 15a-16a, *available at* http://www.usdoj.gov/crt/voting/sec_5 /al_obj2.php. The only sustained objection during Governor Riley's term occurred in the City of Calera in 2008. USDOJ File No. 2008-1621. Calera voluntary entered into a consent decree to ameliorate the problem and is currently awaiting USDOJ's decision whether to lift the objection. *See United States v. Calera,* No. CV-08-BE-1982-S (N.D. Ala) (consent decree) *available at* http://www.usdoj.gov/crt/voting/sec_5/calera_cd.pdf; Scottie Vickery, *Calera Has Two Mayors, Two Sets of Council Members,* The Birmingham News (Jan. 9, 2009) available at *www.al.com* (site search "calera has two mayors" in quotations) (last visited Feb. 26, 2009).

[11]The Governor attaches USDOJ's record of preclearance submissions from every covered jurisdiction since 1990. *See infra* at 1a-14a. Tellingly, the combined number of Alabama submissions between 1965 and 1975 (331), *see* S. Rep. No. 94-

cf id. at 21, 37 (justifying §5's renewal on a greater number of §5 objections between August 1982 and 2005 than between 1965 and August 1982); J.S. App. at 103-106 (district court opinion; same).

As Alabama's leadership progressed, so did its minority voting record. In every year since 1990, black Alabamians have registered and voted in percentages greater than the national average. *See* App. 17a-18a; *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 44-45 (2005) (statement of Ronald Gaddie). By 2004, Alabama virtually eliminated the registration gap between black voters (72.9%) and white voters (73.8%), *see* S. Rep. No. 109-295, at 11, 94 (2006), and Alabama's black voters actually out-participated white Alabamians 63.9% to 62.2% in the 2004 general election. *Id.* at 11; App. 19a.

USDOJ apparently has recognized Alabama's progress at the voting booth. Last year, the United States Attorney General sent more than 800 federal observers and Justice Department personnel to monitor the general election in 59 counties across 23 states, 16 of which are not fully-covered by §5. *See* Press Release, USDOJ, *Department of Justice to Monitor Polls in 23 States Across the Nation on Election Day*, (Oct. 30, 2008) *available at* http://www.usdoj.gov/opa/pr/2008/October/08-crt-973.html (last visited Feb. 26, 2009). Using his "predictive judgment" to determine the nation's likely trouble spots, the Attorney General chose to

295, at 16 (1975), is one-tenth the number of submissions Alabama made between 1995 and 2005 (3460). App. 1a-14a.

monitor just one of Alabama's 67 counties. *See id.*; *cf.* H.R. Rep. No. 109-478, at 44 (2006) (justifying §5's renewal, in part, on "the continued need for Federal observers to monitor polling places located in covered jurisdictions"); J.S. App. at 103-106 (district court opinion; same).

His judgment proved correct. Despite the lack of federal oversight, Alabamians cast more than two million ballots in what Secretary of State Beth Chapman described as "close to a flawless Election Day." *Alabamians Cast Record Number of Votes*, Associated Press (Nov. 5, 2008). According to the Election Protection Coalition, Alabama, the nation's 23rd most populous state, finished tied for 27th in the number of reported problems during the 2008 general election cycle.[12] *See* Our Vote Live, *Nationwide Problems Map*, http://www.ourvotelive.org/map.php (last visited Feb. 26, 2009). In fact, Alabama had fewer voting-related problems than the following less-populated, non-covered jurisdictions: Nevada; New Mexico; Essex County, New Jersey; Riverside County, California; Franklin and Cuyahoga Counties, Ohio; and Broward, Miami-Dade, and Hillsboro Counties, Florida. *Id.*

* * *

[12]The Election Protection Coalition is the nation's largest, bi-partisan coalition dedicated to reporting and preventing registration and polling place problems. The statistics used in this brief were taken from the Coalition's twin websites, *www.ourvote.org* and *www.ourvotelive.org*, and the population data was taken from the United States Census Bureau website, *www.census.gov*.

Alabama is by no means perfect. But neither is Alabama the same state that justified §5's creation in 1965 or its renewal in 1975. As the following table shows, each of the factors that justified §5's renewal in 1975, *see City of Rome*, 446 U.S. at 180-81, swung in Alabama's favor by 2006:

	1965	1975	2006
African-Americans Registered to Vote	19.4%	57.1%	72.9%
Registration Disparity Black vs. White Voters	49.9%	19.3%	0.9%
African-Americans In The State Legislature	0%	10.7%	25.0%
Preclearance Objections (preceding 10 yrs.)	n/a	6.64%	0.06%

Simply put, Alabama is under new management, chosen by a new electorate. In 2006, Congress amassed no evidence suggesting that, without §5, Alabama's modern leadership and their successors through 2031 stood poised to systematically defy federal court orders to deny minority voting rights. The reason is simple: It is not true.

II. SECTION 5 IMPOSES A VARIETY OF BURDENS ON ALABAMA'S DEMOCRATIC PROCESS.

In the remaining pages, the Governor presents seven stories from his six years in office that demonstrate the variety of burdens that §5 imposes on a fully-covered state. Before placing the Court in the trenches with §5, however, the Governor details Alabama's implementation of §5's preclearance requirements.

A. HOW §5 WORKS IN ALABAMA.

Section 5 requires Alabama and its political subdivisions to obtain federal permission (*i.e.* "preclearance") before they may enforce any change in a voting-related standard, practice, or procedure. *See* 42 U.S.C. §1973c; 28 C.F.R. §51.1. Changes requiring preclearance include, but are not limited to,

- "Any change in qualifications or eligibility for voting,"
- "Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting," and,
- "Any change in the boundaries of voting precincts or in the location of polling places."

28 C.F.R. §51.13(a), (b), (d).

At the state level, the Attorney General monitors Acts of the Legislature for "covered" changes, and state executive officials inform the Attorney General when they make a voting-related change. If a voting-related change possesses statewide effect, the Attorney General submits it for preclearance. If a change is local in nature, the Attorney General informs the appropriate local official of his obligation to seek preclearance.[13] If a change originates at the local level (a municipal annexation, for example), the local officials identify and submit the change.[14]

Once a voting change is identified, Alabama and its political subdivisions bear the burden of proving to USDOJ that the change is not "retrogressive;" that is, the change does not discriminate against minorities in purpose or effect.[15] 42 U.S.C. §1973c; *see also* 28 C.F.R. §§ 51.1-51.67 (preclearance guidelines). To satisfy USDOJ's submission requirements, Alabama must, at a minimum, compile and submit 16 pieces of information. 28 C.F.R. §51.27. In a nutshell, Alabama must (1) detail the old and new practices,

[13]To help local officials satisfy their §5 responsibilities, the Attorney General has developed a step-by-step guide for submitting a preclearance request, App. 23a-30a, and offers advice or assistance as requested.

[14]The issue of whether state court opinions are covered changes is still unanswered. *See infra* Issue II(C)(2). No mechanism presently exists for monitoring voting-related changes arising from state court decisions.

[15]Alabama also has the option of seeking preclearance from a three-judge panel of the United States District Court for the District of Columbia. 42 U.S.C. §1973c(a). Virtually all submissions are made to USDOJ, however, because the administrative route is generally faster and less expensive.

and the difference between the two, (2) detail the preclearance and litigation history of the old practice(s), (3) explain why Alabama wants to make the change, and (4) explain how the change impacts minority voters. *Id.*; App. 24a-26a (listing all required information). USDOJ may also request supplemental information from the State, *see* 28 C.F.R. §51.37(a), ranging anywhere from transcripts and DVDs of the State's deliberative process to the name and race of every state legislator for the past 25 years. *See infra* at 25-26, App. 26a-27a. USDOJ also considers outside comments and suggestions as part of its final consideration, 28 C.F.R. §51.53.

Submission times vary. Routine preclearance submissions, such as setting a special election date to fill a legislative vacancy, can be generated in hours. Other submissions may take days, weeks, or even months to draft. *See infra* at Issue II(B)(1-2). Until preclearance is granted, the new practice however beneficial or urgent cannot be enforced. *See Clark v. Roemer*, 500 U.S. 646, 652-53 (1991); 28 C.F.R. §51.10.

B. Section 5 Impedes the Enforcement of Necessary, and Clearly Non-Discriminatory, State Initiatives.

Two recent stories demonstrate how §5's preclearance process may stall the enforcement of necessary, and racially benign, legislative Acts for well over a year.

1. Title 17: Rewriting Alabama's Election Code

Like many states, Alabama progressed from paper ballots, to machine voting booths, to electronic voting. Each new mechanism required specific state laws that remained on the books. Intervening developments such as the federal Help America Vote Act ("HAVA"), *see infra* at Issue II(D), Alabama Attorney General Opinions, and regulations of the Secretary of State also changed Alabama's election law landscape.

Beginning in August 2003, a bi-partisan, bi-racial committee of 25 legislators, attorneys, circuit clerks, probate judges, and the Secretary of State re-wrote Alabama's election code, "Title 17," to embody the modern state of Alabama's election law. After more than two years of committee meetings, public comments, and legislative vetting, Governor Riley signed the 370-page act re-writing Title 17 into law on April 25, 2006. *See* Ala. Act No. 2006-570.

When drafting a preclearance submission, the primary task is to identify each change within an Act. 28 C.F.R. §51.27a-c. To accomplish this task for the new Title 17, the Attorney General relied heavily on materials created by the bi-partisan committee and Alabama Code Commissioner red-lining each change. App. 30a.[16] But these materials were merely a starting point. Over the next few months, the Attorney General analyzed the new Act to

[16]Letter from Attorney General Troy King to Bob McCurley, Director, Alabama Law Institute (Feb. 20, 2007) (on file with counsel) (explaining why Title 17 had yet to be submitted for preclearance 10 months after enactment).

supplement the committee materials, producing a 30-page roadmap and commentary to the changes contained within the new Title 17. USDOJ File No. 2007-3488.

Another task under the USDOJ guidelines is compiling the preclearance history of the soon-to-be "changed" practices. 28 C.F.R. §51.27p. To clear this hurdle, the Attorney General first identified 59 Acts impacted by the new Title 17 that were passed after Alabama's coverage date of November 1, 1964. App. 32a. From there, the Attorney General researched the preclearance history of the 59 Acts and discovered that a handful had not been precleared. *Id.* This discovery required even further attention to the predecessor Acts. *Id.* In the end, this cumbersome process culminated in a 33-page preclearance history chart. USDOJ File No. 2007-3488.

The submission process was further complicated because the Legislature passed several other laws impacting Title 17 during the same legislative session each of which had to be considered in conjunction with Title 17's on-going preclearance submission. *See, e.g.*, Issue II(E)(1); 33a. Needless to say, the overall process of drafting Title 17's submission request consumed weeks, if not months, of state attorney time. App. 30a-35a.

Ultimately, the Attorney General submitted Act 2006-570 for preclearance on July 13, 2007 15 months after it was signed into law. USDOJ File No. 2007-3488. The 44-page submission letter included the 30-page roadmap detailing the changes contained within the Act. *See* 28 C.F.R. §51.27c. The letter was

supplemented by 21 exhibits, including a red-line version of Act 2006-570 (marking the changes) and the 33-page chart detailing the preclearance history of the predecessor Acts. *See* 28 C.F.R. §51.27p; USDOJ File No. 2007-3488. According to its shipping label, the July 13 submission weighed 42 pounds.

USDOJ determined that the July 13 submission failed to provide the requisite clarity for describing the changes. *See* 28 C.F.R. 51.26(d). So, investing approximately 100 additional hours, the Attorney General created and proffered a unified 193-page chart setting out the old and new statutes, side-by-side, with detailed comments on the changes. USDOJ File No. 2007-3488. On October 29, 2007, USDOJ precleared Act 2006-570 (save for one change, which was later withdrawn), thereby allowing the new Title 17 to take effect 18 months after Governor Riley signed it into law.[17] *Id.*

2. Act 2007-488: Modernizing Alabama's County Commissions

A similar situation arose in 2007 when the Association of County Commissions of Alabama ("ACCA") successfully proposed legislation updating and unifying the law governing Alabama's county commissions. Act 2007-488, the "County Modernization Act," served multiple non-

[17]During the 18-month preclearance process, the newly-enacted, but yet-to-be precleared, Title 17 was published on Westlaw and in the updated Alabama Code. To date, Alabama has not devised a system to prevent publication of yet-to-be precleared voting changes, nor do the publishers track preclearance.

discriminatory purposes, such as enabling local officials to update courthouse hours and pushing back the first meeting date of newly-formed county commissions due to the advent of provisional balloting. *See* Ala. Act No. 2007-488. One non-discriminatory purpose is particularly relevant here: Act 2007-488 established a state-wide, one-year residency requirement for (1) all candidates seeking a county commission seat and (2) any person the Governor might appoint to a vacant county commission seat. *Id.* Governor Riley signed Act 2007-488 into law on June 14, 2007. *See id.*

While benign in purpose, the Act was a nightmare to submit for preclearance. Alabama has 67 counties. Submitting the newly-unified residency requirement for preclearance necessarily entailed researching and charting the legislative, preclearance, and litigation histories of the now-superseded requirements of the 67 counties. *See* 28 C.F.R. §51.27. To accomplish this task, the Attorney General created a multi-page questionnaire addressing the information required by 28 C.F.R. §51.27 and distributed it to each county. While the questionnaires were pending, the Attorney General researched local acts regarding local commissioner residency requirements, as far back as the late 1800's, to establish the baseline practice for each county. (Tracing these legal pedigrees, of course, is pointless absent §5.)

Spending hundreds of hours in the year-long process, the Attorney General ultimately lodged three preclearance submissions concerning Act 2007-488, the last of which encompassed the work on the one-year residency requirement. USDOJ File Nos.

2008-427, 2008-1576, 2008-3861, 2008-5601. That final submission exceeded 1,700 pages, including voluminous exhibits and a 103-page appendix summarizing the applicable local law, baseline practices, preclearance history, and litigation history for all 67 counties. *Id.* USDOJ approved the last of the three submissions, allowing the County Modernization Act to take full effect, on December 22, 2008 18 months after Governor Riley signed it into law.[18] *See id.*

C. Outside Forces Can and Will Use §5 as a Political Tool.

While benign submissions can be taxing enough, §5's financial and temporal costs skyrocket when politics are thrown into the preclearance mix. The following stories, both of which personally involved Governor Riley, demonstrate two ways that §5 can be used as a political tool to block enforcement of democratically-approved initiatives: (1) lobbying USDOJ for an objection and (2) filing §5 litigation.

1. Double Dipping

"Double dipping" is the practice of simultaneously serving in the state legislature and another government agency. For decades, double dipping tainted Alabama's two-year college system because legislators often peddled their legislative

[18]Like the new Title 17, Act 2007-488 was published before it was precleared. Consequently, state officials took steps to ensure that local officials would *not* apply the residency requirements enacted in 2007 during the 2008 elections. *See* Letter from Beth Chapman, Secretary of State to Probate Judges, Registrars, Political Party Officials, and County Commission Chairmen (Feb. 15, 2008) (on file with counsel).

influence for sham "educational" jobs, either for themselves or family members. In 2007, journalist Brett Blackledge earned the Pulitzer Prize by exposing the depth of the problem: One-quarter of Alabama's legislators, or their family members, double-dipped in Alabama's two-year college system. Brett Blackledge, *Dozens of Legislators Paid by Two-Year Colleges*, The Birmingham News (Oct. 8, 2006).[19] The aftermath has included federal convictions of "about a dozen people," including the former Chancellor of the two-year system and three State Legislators. Lee Roop, *Schmitz Guilty of Fraud, Loses Seat*, The Huntsville Times (Feb. 25, 2009) *available at* www.al.com (site search for "Schmitz guilty of fraud") (last visited Feb. 26, 2009) (detailing the federal conviction of a State Legislator who bilked more than $177,000 from Alabama's two-year system).

In April 2007, Governor Riley responded on two fronts. First, the Governor introduced twin bills in the House (H.B. 667) and Senate (S.B. 395) banning legislators from double dipping in any state agency. Not surprisingly, the bills swiftly perished. Second, in his role as President of the State Board of Education, the Governor proposed policies that would end double dipping in the two-year college system. Despite vocal opposition from several legislators and special interest groups, on August 23, 2007, the bi-partisan Board passed two policies. Policy 609.04 requires legislators to take accrued leave from their educational jobs when serving in the legislature. Policy 220.01 bans active legislators

[19]Mr. Blackledge's entire series, and its aftermath, can be viewed on-line at http://blog.al.com/twoyear/.

from holding employment within the two-year college system after the 2010 election.

The Board promptly submitted both policies for §5 preclearance on September 6, 2007. USDOJ File No. 2007-4397. The opposing legislators and special interest groups immediately shifted their political assault to a new front: the Justice Department. For example, one group of Democratic legislators lobbied USDOJ to interpose a §5 objection based on the theories that (1) banning double dipping would cause many black Democrats to either resign or not seek re-election due to lost income and (2) "if all the Democrats were replaced by Republicans, the balance in the House" would shift political parties. USDOJ File No. 2007-4397, Letter from Edward Still to John Tanner, Chief, Voting Section (Sept. 18, 2007).

Beyond the ethical question of double dipping, the premise of the legislators' political concerns was legally flawed: Even if a legislator left office, the voters of his district, not Governor Riley, would choose his replacement. *See* Ala. Code § 17-15-1. Alabama has successfully precleared Governor Riley's setting of a special election to fill a legislative vacancy on numerous occasions. *See* USDOJ File Nos. 2004-3196 (House District 47, death); 2004-3869 (Senate District 24, resignation, and HD 65, death); 2004-4547 (HD 82, resignation); 2005-0161 (HD 46, resignation); 2005-0768 (HD 72, resignation); 2005-4282 (HD 31, death); 2005-4588 (HD 1, death); 2006-6924 (HD 22, death); 2007-3166 (SD 32, resignation); 2007-4751 (HD 12, resignation); 2008-5759 (SD 7, resignation); 2009-0112 (SD 22, death); *see also* 2009-0343 (SD 19, federal felony conviction, submission

pending as of Feb. 20, 2009). In fact, the Governor will soon set a special election schedule (requiring §5 preclearance) to replace a State Legislator who was convicted just this week on seven counts of fraud for double dipping. Roop, *Schmitz Guilty of Fraud, Loses Seat, supra.*

Nevertheless, citing the Legislators' "concerns," USDOJ requested the following supplementary information:

- "A comprehensive list of individuals affected by Policy 609.04;"
- "Any transcripts or DVDs" of the Board of Education meetings and legislative committee meetings in which the double dipping policies were considered;
- The "total employment statistics" for the entire state of Alabama, "broken down by race;"
- A "breakdown," by race, of employment in Alabama's state agencies, its K-12 school system, and the two-year and four-year college systems; and,
- The name and race of every state legislator for the past 25 years, plus a designation of which legislators had been employed in Alabama's educational systems.

USDOJ File No. 2007-4397, Letter from John Tanner, Chief, Voting Section to Bradley Byrne, Chancellor (Nov. 2, 2007).

Over the next eight weeks, a team of state and private attorneys worked countless hours, at taxpayer expense, to compile the requested information.[20] On December 28, 2007, Governor Riley and the new post-secondary Chancellor, Bradley Byrne, supplemented the original submission with the items listed above, the items required by 28 C.F.R. §51.27, and 22 exhibits, including a 29-page history of Alabama's double dipping dilemma, which itself contained 59 exhibits.[21] USDOJ File. No. 2007-4397, "Supplemental Submission Under Section 5, Voting Rights Act of 1965."

The Governor's supplement explained that (1) Policy 609.04 was not retrogressive because it merely required a legislator "be present at work during his or her duty hours and expending accrued leave-time for absences" and (2) Policy 220.01 was not retrogressive because "minorities may continue to vote for any person of their choosing." *Id.* On February 29, 2008, USDOJ precleared Policy 220.01 (the double dipping ban) and ruled that Policy 609.04

[20]Private attorneys alone logged (and billed) approximately 110 hours on the preclearance effort between December 2007 and February 2008.

[21]At USDOJ's request, the Board previously had submitted a DVD of its "entire [April 26, 2007] meeting" where "the Board, including its chairman Governor Bob Riley, discussed, in detail" the double dipping ban. USDOJ File. No. 2007-4397, Letter from Ella B. Bell, Member, State Board to John Tanner, Chief, Voting Section (October 5, 2007).

(the leave policy) was not a voting change that required preclearance. USDOJ File No. 2007-4397.

While preclearance was ultimately achieved, §5 turned the federal executive into a supplementary appeals court for political forces to challenge unfavorable outcomes in the state legislative and judicial processes.[22] *See* 28 C.F.R. §51.53 (allowing USDOJ to consider information submitted by "individuals or groups"). Just as troubling, §5 vested USDOJ with the authority to impede or block the Governor's attempt to eliminate legislative double dipping in the two-year system at the same time USDOJ was itself prosecuting Alabama legislators for double dipping in Alabama's two-year system. *See Lawmaker Indicted In 2-Year College Probe*, The Associated Press (Feb. 1, 2008); Roop, *Schmitz Guilty of Fraud, Loses Seat, supra.* In other words, when the two sovereigns reacted to the same situation with a common purpose, only the State did so with a federally-induced handicap.

2. *Kennedy* and *Plump*

The Court is familiar with §5's use in litigation, as the following story recently brought Governor Riley before the Court on two occasions. While each case possesses its own nuances, the general facts overlap.

Long before §5, Alabama law required that vacant county commission seats be filled by

[22]Several legislators also filed suit against the Board policies in state court, and that action is currently pending before the Alabama Supreme Court. *See Byrne v. Galliher*, No. 1080247. (Ala. filed Nov. 17, 2008).

gubernatorial appointment. *See* Ala. Code §11-3-6 *repealed by* Ala. Act 2007-488. Local laws in Jefferson County (1977) and Mobile County (1985) purported to change the selection method to special elections. *See* Ala. Acts 77-784, 85-237. The Alabama Supreme Court struck down Mobile County's local law as unconstitutional under state law, thereby casting constitutional doubt on Jefferson County's similar law. *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988); *see also Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005) (holding that a 2004 legislative act did not revive the Mobile County local law). Following the state supreme court's decisions, Governor Riley appointed Juan Chastang to fill a commission vacancy in Mobile County and General George W. Bowman to fill a vacancy in Jefferson County. Both men were African-American, and both seats were in majority-minority districts.[23]

With each appointment, Governor Riley was sued under the following two-part theory: (1) The local laws, which had been precleared, changed the baseline practice from gubernatorial appointment to special elections and (2) any change back to gubernatorial appointment even if the local laws were unconstitutional was a change that required preclearance under §5. In *Kennedy*, this Court agreed with the Governor that Mobile County's local law never went into "force or effect;" thus no change occurred within the meaning of §5. *See Kennedy*, 128 S. Ct. at 1984-86. In *Plump*, this Court dismissed the Governor's appeal for want of jurisdiction. *See Plump*, 129 S. Ct. at 98.

[23]The vacancies were created when an African-American was elected mayor of Alabama's largest city (Larry Langford in Birmingham) and its third largest city (Sam Jones in Mobile).

The Governor recalls *Kennedy* and *Plump* to make two points.

1. Neither §5 lawsuit was based on race (both of the Governor's appointees were black); the lawsuits were based on political affiliation. When former Governor Don Siegelman, a Democrat, appointed Reverend Steve Small to a vacant Jefferson County Commission seat in 2001, he did so without objection or §5 litigation. *See* Val Walton, *U.S. Court Asked to Oust Riley Appointee*, The Birmingham News (November 29, 2007) *available at* https://www.edwardstill.com/Bham%20News%202002%2011%2029.pdf (last visited Feb. 26, 2009). Yet, when Governor Riley, a Republican, appointed two African-Americans to fill vacant majority-minority seats, he was sued to block the appointees from taking office, and the Democratic Party accused the Governor of "thwarting the democratic process.[24]" *Id.* Both rounds of political wrangling were funded, at great cost, by Alabama's taxpayers.[25]

[24]Each of the three plaintiffs in *Kennedy* was a Democratic state legislator.

[25]The Governor cannot give an exact financial cost for both defenses, because state attorneys (who do not track and bill time), as well as private attorneys, defended the Governor. A good starting point, however, may be the fee requests made by the Plaintiffs' attorneys for their work in *Plump* ("approximate[ly] $110,000") and *Kennedy* ($109,994.96). *See Plump, v. Riley*, No. 2:07-cv-01014-MEF-CSC (Doc. 51); *Kennedy v. Riley*, No. 2:05-cv-01100-MHT-DRB (Doc. 62). Included within the *Kennedy* fees request was compensation for time spent drafting objection letters and teleconferencing with the chief of USDOJ's voting section. *See* Issue II(C)(1).

2. The Court left unresolved the question festering in *Kennedy*: Does §5 require preclearance of a state supreme court decision interpreting the state constitution? If the answer is yes, as USDOJ asserted, then the federal government has the power to overrule Alabama's Supreme Court and to force Alabama's Governor to administer unconstitutional state laws. *See* Brief for the United States as Amicus Curiae Supporting Appellees in Part, *Riley v. Kennedy*, No. 07-77, at 10.

This issue may come to a head again soon. Alabama Act 2006-355 directs Governor Riley to appoint a new circuit judge in Talladega County "on or after October 1, 2009," and establishes general elections to determine that judge's successors in subsequent years. Ala. Act No. 2006-355; *see also* Ala. Const. Art. VI, § 153 (requiring a judicial appointee sit for one year before election); Ala. Const. amend. 615 (same). USDOJ precleared Act 2006-355 on June 29, 2006. USDOJ File No. 2006-4167.

Days later, litigation was filed in state court challenging the Act. Ultimately, the Alabama Supreme Court declared that Act 2006-355 unconstitutionally vested appointment power in the Governor, severed the appointment provision, and declared an election must be held in 2010. *See King v. Campbell*, 988 So. 2d 969 (Ala. 2007). The *Campbell* decision thus "changed" the date and manner of judicial selection prescribed by Act 2006-355, thereby placing the State in a Catch-22. Alabama can either (1) forgo seeking preclearance of the supreme court's decision and run the risk of another costly round of §5 litigation when the *Campbell* decision is followed or (2) expend public

resources to gain preclearance of the court's decision, thereby placing the fate of Alabama constitutional law in the hands of the federal government.

D. When it Comes to Federally-Mandated Changes, Preclearance Can Lead to Taxing and Absurd Results.

Section 5 was created to quash racist state initiatives, *see Beer*, 425 U.S. at 140, but it also requires covered states to submit for preclearance their responses to federally mandated changes. For example, the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. §§ 15301 *et seq.*, mandated not only that Alabama change many of its voting practices, but also that Alabama preclear the federally-mandated changes. 42 U.S.C. §15545(b). Alabama responded to HAVA with Act 2003-313, which Governor Riley signed into law on June 19, 2003. *See* Ala. Act. No. 2003-313. The Attorney General submitted Act 2003-313 for preclearance, which USDOJ granted in November 2003. USDOJ File Nos. 2003-2245 & 2003-3434.

Instead of rehashing the process of preclearing the 76-page Act, which included changes to more than 20 individual sections of the Alabama Code, *see id.*, the Governor presents three examples of how taxing, and in some cases absurd, preclearing particular federally-mandated changes can be.

1. HAVA contains detailed standards for the type of voting machinery a state may employ. *See* 42 U.S.C. §15481. In Alabama, the process of purchasing HAVA-compliant machines was handled

at the county level. To assist county officials, the Attorney General spearheaded a unified preclearance submission. As he did with the County Modernization Act, *see supra* at 21, the Attorney General first developed and sent out questionnaires to gather the necessary information under 28 C.F.R. §51.27 and then followed up with the counties as needed. This process culminated in the creation of a table embodying the equipment changes in 54 of Alabama's 67 counties, as well as a letter setting out the remaining information required by 28 C.F.R. §51.27. Two months later, USDOJ precleared the changes for use in the June 2006 primary election. See USDOJ File Nos. 2006-2900, 2006-3444, 2006-3446, 2006-3449, 2006-3450, 2006-3454, 2006-3470 through 2006-3484, 2006-3533, 2006-3537, 2006-3539 through 2006-3541, 2006-3548, 2006-3551, 2006-3555, 2006-3556, 2006-3568 through 2006-3580, and 2006-3583 through 2006-3594.

This, however, was not the end of the story. In Alabama, municipalities manage their own elections, but generally use the same voting machines as their corresponding counties. The preclearance submissions described above applied to federal, state, and county elections (which are held simultaneously), but not to municipal elections. So, when it came time for a vast majority of Alabama's approximately 450 municipalities to hold elections in 2008, §5 required each municipality to seek preclearance to use the same machines, unnecessarily creating preclearance *déjà vu*.

2. HAVA mandated that Alabama switch from its county-based registration databases to a unified statewide electronic database. 42 U.S.C.

§15483. A federal court appointed Governor Riley special master over the database switch. *See United States v. Alabama*, No. 2:06-CV-00392-WKW (M.D. Ala.).[26] Under Governor Riley's leadership, and the federal court's watchful eye, Alabama's old county databases were replaced with a new, HAVA-compliant statewide database.

This switch raised an interesting §5 question, which has yet to be answered: When undertaken by a federal court's special master in response to litigation filed by the United States, is a federally-mandated switch from a local to statewide registration database a voting-related change that requires §5 preclearance? If it is, compliance with §5 may be out of the question. As part of the mandated switch, the old, non-uniform systems were dismantled and carted-off, thus making it (1) extremely difficult to ascertain the historical information required for a preclearance submission and (2) impossible to revert back to the old, non-HAVA compliant system pending the outcome of the preclearance process. 28 C.F.R. §51.27b, c, p.

3. HAVA also requires that states ask specific questions on their mail-in registration forms, such as "Are you a citizen of the United States of America?" 42 U.S.C. §15483(b)(4). While compiling the information required by 28 C.F.R. §51.27 for the linguistic changes was not particularly taxing, submitting the altered forms for preclearance was nonetheless complicated by several factors.

[26]The *United States v. Alabama* litigation regarded timely compliance with the database switch. The complaint raised no allegations of racially discriminatory state initiatives.

For example, Alabama's mail-in registration form underwent several cosmetic changes over the years, such as changing the name of the Secretary of State and updating the contact information for the Board of Registrars. Because USDOJ took the position that any change to the form required preclearance, and the changes had not previously been submitted for preclearance, the State had to retroactively seek preclearance for each of these changes, as well as preclearance of the new HAVA-mandated changes. *See* 28 C.F.R. §51.27.

Furthermore, a plaintiffs' attorney urged USDOJ not to preclear the revised form thereby preventing Alabama from becoming HAVA-compliant based on his on-going litigation against state officials regarding felon voting. *See* USDOJ File No. 2006-4509; *Chapman v. Gooden*, 974 So. 2d 972, 980 (Ala. 2007) (describing a change to the registration form regarding felon voting and the reasons for it).

That Alabama ultimately overcame these difficulties to achieve preclearance, *see* USDOJ File No. 2006-4509, is beside the point. An important fact remains: Alabama had to endure difficulties that were foreign to non-covered states, who simply typed the newly-required language into their old forms and instantly became HAVA-compliant.

E. Section 5 Handicaps, and May Even Prevent, Alabama From Making the Same Non-Discriminatory Changes Made by Non-Covered States.

Being "covered" by §5 places jurisdictions at a severe disadvantage when attempting to make the same non-discriminatory change made by a non-covered state. Two final stories to prove the point. The first involves a nationwide change in which Alabama was ultimately successful in joining, but not without its share of §5-induced headaches. The second involves a non-discriminatory change that Alabama may be foreclosed from making.

1. "Super Tuesday" 2008

In April 2006, Alabama decided to push forward its Presidential preference primary from the first Tuesday in June, *see* Ala. Code § 17-16A-1(a) (1995), to the first Tuesday in February. Like each of the 24 states that made February 5, 2008 "Super Tuesday," Alabama's purpose was clearly non-discriminatory: "Any time we can make sure that Alabama has a stronger voice in national politics, we need to take advantage of it." *Bill Would Set Earlier Presidential Primary*, The Birmingham News (Apr. 12, 2006) (quoting Governor Riley). Section 5 simply made Alabama's switch more difficult.

On April 17, 2006, the Legislature passed Act 2006-634, which moved the primary to the first Tuesday in February. Ala. Act 2006-634. While the Act was on Governor Riley's desk, a problem was reported: Fat Tuesday fell on February's first Tuesday in 2008. Dan Murtaugh, *Primary, Carnival*

on Track to Clash, Mobile Press Register (Apr. 19, 2006) (on file with counsel). This created a dilemma in Mobile and Baldwin Counties because Fat Tuesday is an official holiday and downtown Mobile is transformed into a Mardi Gras parade route. *See id.*; Ala. Code § 1-3-8(c). To remedy the problem, the Legislature passed Act 2007-461, which required Mobile and Baldwin Counties to open polls both on Fat Tuesday and the preceding Wednesday. Ala. Act 2007-461.

Submitting both Acts for preclearance was no easy chore. Due to the Fat Tuesday fix, "changes" were made not only to the primary dates, but also to the rules for absentee voting, poll workers, and voter registration deadlines. *Id.* Furthermore, Mobile and Baldwin Counties had to open special election centers. *Id.* Each of these changes required preclearance. Later, language on the absentee registration forms had to be altered and submitted for preclearance. USDOJ File No. 2007-5733.

To complicate matters further, the Alabama Attorney General received a complaint that adding an additional primary was retrogressive under the theory that minorities tended to vote less as the number of elections in a year increased.[27] *Id.* Alabama included this complaint in its 35-page submission letter to USDOJ. *Id.* Alabama also included within its 27 exhibits a list of minority contacts and six charts of census data. USDOJ File No. 2007-3347.

[27]The remainder of Alabama's federal, state, and county primaries remained on the first Tuesday in June.

The story has a happy ending: USDOJ precleared both Acts, *id.*, and Alabama bested its previous record turnout for a Presidential primary by 11%. *Alabama Has Record-Breaking Presidential Primary*, Press Release, Alabama Secretary of State (Feb. 7, 2008) *available at* http://www.sos.alabama.gov/PR/PR.aspx?ID=274 (last visited Feb. 26, 2009). The point is that when approximately 20 non-covered states made the same decision to hold their elections on Super Tuesday, they did so without struggling through a four-month preclearance process.[28] Furthermore, §5 granted the federal government the power to prevent Alabama from moving its primary date to Super Tuesday—a power it did not hold over non-covered states.

2. Appointing Supreme Court Justices

Since the Court granted cert in *Caperton v. A.T. Massey Coal*, No 08-22, the national debate between electing and appointing state supreme court justices has intensified. For example, Texas's Chief Justice, the Honorable Wallace Jefferson, recently called for Texas to switch from judicial elections to merit-based appointments, and a corresponding bill was immediately introduced in the Texas Senate. *See, e.g., Jefferson: Change Judicial Selection System*, The Associated Press (Feb. 11, 2009) *available at* http://www.kristv.com/Global/story.asp?S=9827329 (last visited Feb. 26, 2009).

[28]The second Act, Act 2007-461, was passed on April 16, 2007. The Attorney General submitted both Acts for preclearance on June 29, 2007 and provided supplemental information on August 28. USDOJ File No. 2007-3347. USDOJ precleared both acts on August 30, 2007. *Id.*

Alabama knows this debate well; it was home to the nation's most expensive state supreme court race in 2008. *See* Eric Valesco, *Alabama High Court Race Again Garners Most Expensive Pricetag in U.S.*, The Birmingham News (Jan. 31, 2009) *available at* http://www.al.com/ (site search for "high court race again garners") (last visited Feb. 26, 2009). The Alabama State Bar has long advocated that Alabama switch from electing its appellate judges to a system of merit-based gubernatorial appointments; a position shared by Alabama's Chief Justice Sue Bell Cobb, if non-partisan elections are unattainable. *Cobb Wants to See Change and Prove Justice Is Not for Sale*, The Tuscaloosa News (Mar. 5, 2007) *available at* http://www.tuscaloosanews.com/article/20070305/NEWS/703050310 (last visited Feb. 26, 2009).

Section 5, however, may render the "election versus appointment" debate purely academic in Alabama (and Texas). Eliminating judicial elections is clearly a voting change requiring §5 preclearance. *See* 28 C.F.R. §51.13(i). While the purpose of switching to merit-based appointments is non-discriminatory, the effect may be considered retrogressive: Minority voters would lose the ability "to elect their preferred candidates of choice." 42 U.S.C. §1973c(b). Thus, under §5, the federal government could veto any change. *See id.*; 28 C.F.R. §51.52(c). And while it is admittedly impossible to predict the ultimate federal response, USDOJ has twice objected to changes from election to appointment in Alabama's past. *See* USDOJ File Nos. V4105 (objecting to a statewide change from electing to appointing justices of the peace); 2006-6795 (objecting to Governor Riley's appointment of

Juan Chastang to the Mobile County Commission; withdrawn after the Court's decision in *Kennedy*).

Of course, the Governor's point is neither to take sides in the "election versus appointment" debate nor to predict USDOJ's position. The point is simply this: Under §5, if Alabama ever seeks to switch to judicial appointments *i.e.* a process that is available to every non-covered state and has worked for this Court for 220 years the ultimate choice of Alabama's selection process will be made by the federal government.

CONCLUSION

This Court should consider §5's burden on a fully-covered state, as well as the changes in Alabama's government and voting record since 1965.

Respectfully submitted,

Kenneth D. Wallis, II
Chief Legal Advisor

Office of the Governor
600 Dexter Avenue,
Suite NB-05
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(334) 242-7120

Corey L. Maze
Solicitor General
Counsel of Record

Misty S. Fairbanks
Ass't Attorney General

Office of the
Attorney General
500 Dexter Avenue
Montgomery, AL 36130
(334) 242-7300

February 26, 2009

APPENDIX

U.S. Department of Justice

Civil Rights Division

Freedom of Information/Privacy
Acts Branch – NALC
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

NDH:TCG:ANF
2008-0526(4-425)

SEP 30 2008

Misty S. Fairbanks
Alabama State House
11 South Union Street, 3rd Floor
Montgomery, Alabama 36130-0152

Dear Ms. Fairbanks:

This is in response to your Freedom of Information Act request dated September 23, 2008, for a copy of the "Submission Tracking and Processing (STAPS) Statistics Report" to cover the years 1990 to 2008.

Enclosed please find a copy of the document that you requested.

I hope the Civil Rights Division has been of some assistance to you in this matter.

Sincerely,

s/ Tawana C. Greene for
Nelson D. Hermilla, Chief
Freedom of Information/ Privacy Acts Branch
Civil Rights Division

Date: 09-23-2008
Time: 10:22 AM

Submissi[on] Tracking And Processing System [(ST]APS) Statistics Report

Number of Submissions By State for All Calendar Years

State Name	1990	1991	1992	1993	1994
AI.ABAMA 0/	296	198	404	183	248
AI.ASKA 1/	72	61	115	92	72
ARIZONA 2/	234	151	208	165	193
ARKANSAS 5/	0	1	0	1	0
CALIFORNIA 8/	23	41	118	89	87
COLORADO 3/	***	***	***	***	***
CONNECTI[-] CUT 4/	***	***	***	***	***
FLORIDA 3/	32	28	33	22	51
GEORGIA 0/	906	590	1028	790	857
HAWAII 3/	***	***	***	***	***
IDAHO 3/	***	***	***	***	***
ILLINOIS 7/	1	***	***	***	***
LOUISIANA 0/	430	463	616	495	446
MAINE 4/	***	***	***	***	***

MASSACHU[-] SETTS 4/	***	***	***	***	***
MICHIGAN 4/	0	3	7	1	3
MISSISSIPPI 0/	219	315	238	176	178
NEBRASKA 5/	***	***	***	***	***
NEW HAMPSHIRE 4/	0	0	11	0	1
NEW MEXICO 6/	4	9	5	7	1
NEW YORK 3/	65	50	44	42	15
NORTH CAROLINA 3/	201	229	171	169	157
OKLAHOMA 3/	***	***	***	***	***
SOUTH CAROLINA 0/	357	278	427	298	316
SOUTH DAKOTA 3/	0	0	3	0	1
TEXAS 0/	1597	1737	1445	1534	1665
VIRGINIA 0/	372	438	434	357	370
WYOMING 3/	***	***	***	***	***
Totals	4809	4592	5307	4421	4661

0/ Fully covered

1/ Entire state covered 1964-1966; selected election districts covered 1971-1972; entire state covered since 1975.

2/ Selected counties covered until 1975; entire state covered since 1975.

3/ Selected county (counties) covered rather than the entire state.

4/ Selected towns covered rather than the entire state.

5/ Coverage pursuant to court order under Section 3.

6/ Selected counties covered in 1976; subsequent coverage of state, for certain changes and three counties under Section 3.

7/ County covered under court order under Section 3; not covered in 1990, however, made one submission.

8/ Selected counties covered under Section 5; subsequent coverage under Section 3 for an individual county.

*** Not covered for years indicated

Date: 09-23-2008
Time: 10:22 AM

Submissi[on] Tracking And Processing Syste[m (ST]APS) Statistics Report

Number of Submissions By State for All Calendar Years

State Name	1995	1996	1997	1998	1999
AI.ABAMA 0/	181	288	233	237	287
AI.ASKA 1/	67	79	64	107	82
ARIZONA 2/	240	210	195	198	235
ARKANSAS 5/	0	0	1	0	1
CALIFORNIA 8/	64	36	28	43	36
COLORADO 3/	***	***	***	***	***
CONNECTI[-] CUT 4/	***	***	***	***	***
FLORIDA 3/	26	26	15	52	30
GEORGIA 0/	598	556	611	551	537
HAWAII 3/	***	***	***	***	***
IDAHO 3/	***	***	***	***	***
ILLINOIS 7/	***	***	***	***	***
LOUISIANA 0/	403	460	507	504	497
MAINE 4/	***	***	***	***	***

MASSACHU[-] SETTS 4/	***	***	***	***	***
MICHIGAN 4/	2	2	0	0	1
MISSISSIPPI 0/	239	203	150	180	216
NEBRASKA 5/	***	***	***	***	***
NEW HAMPSHIRE 4/	0	0	0	0	0
NEW MEXICO 6/	3	0	3	1	1
NEW YORK 3/	26	26	35	29	26
NORTH CAROLINA 3/	173	174	199	193	219
OKLAHOMA 3/	***	***	***	***	***
SOUTH CAROLINA 0/	323	367	305	282	257
SOUTH DAKOTA 3/	2	1	0	1	0
TEXAS 0/	1265	1974	1507	1500	1414
VIRGINIA 0/	387	327	194	143	173
WYOMING 3/	***	***	***	***	***
Totals	3999	4729	4047	4021	4012

0/ Fully covered

1/ Entire state covered 1964-1966; selected election districts covered 1971-1972; entire state covered since 1975.

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*** Not covered for years indicated

Date: 09-23-2008
Time: 10:22 AM

Submiss[ion] Tracking And Processing Syste[m (S]TAPS) Statistics Report

Number of Submissions By State for All Calendar Years

State Name	2000	2001	2002	2003	2004
AI.ABAMA 0/	609	241	347	355	456
AI.ASKA 1/	65	85	103	78	86
ARIZONA 2/	235	178	309	248	268
ARKANSAS 5/	0	1	1	0	0
CALIFORNIA 8/	59	56	55	62	75
COLORADO 3/	***	***	***	***	***
CONNECTI[-] CUT 4/	***	***	***	***	***
FLORIDA 3/	31	19	37	22	46
GEORGIA 0/	661	590	963	1014	958
HAWAII 3/	***	***	***	***	***
IDAHO 3/	***	***	***	***	***
ILLINOIS 7/	***	***	***	***	***
LOUISIANA 0/	397	305	724	502	478
MAINE 4/	***	***	***	***	***

MASSACHU[-] SETTS 4/	***	***	***	***	***
MICHIGAN 4/	1	4	5	27	3
MISSISSIPPI 0/	174	118	264	188	203
NEBRASKA 5/	***	***	***	***	***
NEW HAMPSHIRE 4/	0	0	3	0	44
NEW MEXICO 6/	1	0	2	2	3
NEW YORK 3/	11	23	21	48	17
NORTH CAROLINA 3/	219	265	230	213	219
OKLAHOMA 3/	***	***	***	***	***
SOUTH CAROLINA 0/	336	241	398	292	347
SOUTH DAKOTA 3/	0	2	3	16	23
TEXAS 0/	1647	1751	2224	1569	1775
VIRGINIA 0/	192	343	221	195	209
WYOMING 3/	***	***	***	***	***
Totals	4638	4222	5910	4831	5210

0/ Fully covered

1/ Entire state covered 1964-1966; selected election districts covered 1971-1972; entire state covered since 1975.

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*** Not covered for years indicated

Date: 09-23-2008
Time: 10:22 AM

Submiss[ion] Tracking And Processing Syste[m (S]TAPS) Statistics Report

Number of Submissions By State for All Calendar Years

State Name	2005	2006	2007	2008	Totals
ALABAMA 0/	226	396	346	595	6126
ALASKA 1/	38	68	68	66	1468
ARIZONA 2/	316	332	312	214	4441
ARKANSAS 5/	0	0	0	0	6
CALIFORNIA 8/	99	111	69	46	1197
COLORADO 3/	***	***	***	***	***
CONNECTI[-] CUT 4/	***	***	***	***	***
FLORIDA 3/	23	40	22	19	574
GEORGIA 0/	921	907	858	617	14513
HAWAII 3/	***	***	***	***	***
IDAHO 3/	***	***	***	***	***
ILLINOIS 7/	***	***	***	***	1

LOUISIANA 0/	403	421	455	380	8886
MAINE 4/	***	***	***	***	***
MASSACHU[-] SETTS 4/	***	***	***	***	***
MICHIGAN 4/	1	4	10	1	75
MISSISSIPPI 0/	158	127	166	130	3642
NEBRASKA 5/	***	***	***	***	***
NEW HAMPSHIRE 4/	57	2	0	0	118
NEW MEXICO 6/	0	1	0	0	43
NEW YORK 3/	29	15	21	21	564
NORTH CAROLINA/3	214	240	231	172	3888
OKLAHOMA 3/	***	***	***	***	***
SOUTH CAROLINA 0/	308	346	362	283	6123
SOUTH DAKOTA 3/	16	8	5	7	88
TEXAS 0/	1689	3900	3056	2155	35404
VIRGINIA 0/	235	194	162	184	5130
WYOMING 3/	***	***	***	***	***

Totals	4733	7112	6143	4890	92287

0/ Fully covered

1/ Entire state covered 1964-1966; selected election districts covered 1971-1972; entire state covered since 1975.

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*** Not covered for years indicated

[USDOJ OBJECTIONS: ALABAMA (1994-2006)]

[Jurisdiction & USDOJ File No.]	[Objection To]	[Date of Objection]
Greensboro (Hale Cty.) (93-4223)	Districting plan for the city council	1-3-94
State (89-1439)	Amendment 425 to the Alabama Constitution, insofar as it provides that a referendum on a local constitutional amendment may not be held unless it is first approved by the Local Constitutional Amendment Commission	1-31-94
State (93-3195-96) (93-2322)	The changes for the courts of criminal and civil appeals and the supreme court occasioned by Act Nos. 602 and 987 (1969), 75 (1971), and 346 (1993) in the context of the at-large method of electing these courts	4-14-94 Withdrawn 3-18-96
Tallapoosa County (97-1021)	Redistricting plan	2-6-98

[Jurisdiction & USDOJ File No.]	[Objection To]	[Date of Objection]
Alabaster (Shelby Cty.) (2000-2230)	Annexations (Ordinance Nos. 94-338 and 96-410)	8-16-00

[BULLOCK-GADDIE]

TABLE 2

REPORTED REGISTRATION BY RACE IN ALABAMA AND OUTSIDE THE SOUTH, 1980-2004

	1980	1982	1984	1986	1988	1990	1992
ALABAMA							
Black	62.2	57.7	71.4	75.4	68.4	65.3	71.8
White	73.3	70.2	77.2	74.3	75	74.9	79.3
Non-South							
Black	60.6	61.7	67.2	63.1	65.9	58.4	63
White	69.3	66.7	70.5	66.2	68.5	64.4	70.9

	1994	1996	1998	2000	2002	2004
ALABAMA						
Black	66.3	69.2	74.3	72	67.6	72.9
White	73.3	75.8	74.1	74.5	73.7	73.8
Non-South						
Black	58.3	62	58.5	61.7	57	na
White	65.6	68.1	63.9	65.9	63	na

Source: Various post-election reports by the U.S. Bureau of the Census

[BULLOCK-GADDIE]

TABLE 3

REPORTED TURNOUT BY RACE IN ALABAMA AND OUTSIDE THE SOUTH, 1980-2004

	1980	1982	1984	1986	1988
ALABAMA					
Black	48.9	41.2	54.8	55.2	52.4
White	59.2	52	62.8	52.5	58.4
Non-South					
Black	52.8	48.5	58.9	44.2	55.6
White	62.4	53.1	63	48.7	60.4

	1990	1992	1994	1996	1998
ALABAMA					
Black	45.7	58.1	53.5	54.3	51.6
White	52.7	65.9	64.3	56.3	51.6
Non-South					
Black	38.4	53.8	40.2	51.4	40.4
White	48.2	64.9	49.3	57.4	45.4

	2000	2002	2004
ALABAMA			
Black	57.2	43.3	63.9
White	60.8	50.7	62.2
Non-South			
Black	53.1	39.3	na
White	57.5	44.7	na

Source: Various post-election reports by the U.S. Bureau of the Census

[BULLOCK-GADDIE]

TABLE 4

NUMBER OF AFRICAN-AMERICAN ELECTED OFFICIALS IN ALABAMA, 1969-2001

Year	Total	County	Municipal	School Board
1969	70	2	34	5
1970	86	4	44	7
1971	105	4	45	12
1972	83	7	42	11
1973	149	20	55	16
1974	149	17	57	16
1975	161	17	60	20
1976	171	19	75	19
1977	201	22	91	23
1980	238	26	115	25
1981	247	32	112	32
1984	314	48	158	44
1985	375	52	212	47
1987	448	71	253	56
1989	694	86	428	86
1991	707	88	473	81
1993	699	94	435	86

Year	Total	County	Municipal	School Board
1995	-------No Report from the Joint Center-------			
1997	726	107	444	85
1999	725	101	439	94
2001	756	99	470	91

Source: Various volumes of *The National Roster of Black Elected Officials* (Washington, D.C.: Joint Center for Political and Economic Studies).

[BULLOCK-GADDIE]

TABLE 5

RACIAL MAKEUP OF THE
ALABAMA LEGISLATURE, 1965-2005

Year	Senate	House	% Black in Senate	% Black in House
1965	0	0	0	0
1967	0	0	0	0
1969	0	0	0	0
1971	0	2	0	1.90
1973	0	2	0	1.90
1975	2	13	5.71	12.38
1977	2	13	5.71	12.38
1979	3	13	8.57	12.38
1981	3	13	8.57	12.38
1983	3	15	8.57	14.29
1985	5	19	14.29	18.10
1987	5	19	14.29	18.10
1989	5	18	14.29	17.14
1991	5	19	14.29	18.10
1993	5	19	14.29	18.10
1995	8	27	22.86	25.71
1997	8	27	22.86	25.71
1999	8	27	22.86	25.71
2001	8	27	22.86	25.71
2003	8	27	22.86	25.71
2005	8	27	22.86	25.71

[LETTERHEAD: ALABAMA ATTORNEY GENERAL]

MEMORANDUM

Date: November 21, 2007

To: All Interested Individuals

From: Winfield J. Sinclair, Assistant Attorney General, Constitutional Defense Division

Re: Making a Preclearance Submission under Section 5 of the Voting Rights Act

Overview

On July 27, 2006, President Bush signed into law a 25-year extension of the preclearance provisions Voting Rights Act. Alabama governments remain under Section 5 preclearance requirements. Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c) requires that the State of Alabama and its political subdivisions seek preclearance from the United States Department of Justice or the United States District Court for the District of Columbia before making any change in any "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting." The Office of the Attorney General makes many submissions under Section 5 to the Department of Justice ("DOJ") each year on behalf of the State but the State's political subdivisions are responsible for submission of local changes (such as annexations or ordinances). The Attorney General's Office can provide a sample submission for reference and comparison to help local officials in their preparation

of such a submission. This memorandum is a brief outline for local officials on how to prepare a Section 5 preclearance submission.

In preparing a preclearance submission to the Department of Justice, you should follow the "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965." The applicable regulations are in Part 51 of Title 28 of the Code of Federal Regulations and can also be found at the Department of Justice website http://www.usdoj.gov/crt/voting/28cfr/51/28cfr51.htm. The Voting Section portion of the website provides a great deal of helpful information regarding making Section 5 submissions at http://www.usdoj.gov/crt//voting/sec_5/about.htm. The Voting Section can also be contacted by telephone at (800) 253-3931 or (202) 307-2767. Their facsimile (FAX) number is (202) 307-3961.

Necessary Submission Contents

Sections 51.26, 51.27 and 51.28 of the DOJ regulations explain the necessary content for submissions. The list of required contents is found in section 51.27 and includes:

a. A copy of the Act, plan, ordinance, etc., to be precleared;

b. A copy of the Act, plan, ordinance, etc., repealed or amended by the submitted Act, plan, ordinance, etc. (if any);

c. An explanation of the change affecting voting;

d. The name, address, and telephone number of the person(s) making the submission;

e. The submitting authority and jurisdiction responsible for making the change;

f. The county and state in which the submitting authority is located;

g. The person or body responsible for making the change and the mode of decision;

h. The statutory authority under which the change is made;

i. The date of adoption of the submitted Act, plan, ordinance, etc.;

j. The effective date of the submitted Act, plan, ordinance, etc.;

k. A statement that the change has not been enforced or an explanation as to why such statement cannot be made;

l. If the change affects less than the entire jurisdiction, the scope of the change;

m. A statement of the reasons for the change;

n. A statement of the anticipated effect on minority groups;

o. Identification and description of past or pending litigation;

p. A statement that the prior practice has been precleared or why it was not precleared; and,

q. Other information as needed.

Supplemental Submission Contents

Section 51.28 lists supplemental contents for submissions. Some of this information is optional, but some is required. For example, maps are required for annexations. Examples of supplemental information include:

1. Maps, if pertinent, showing prior and new boundaries and location of racial groups;

2. Demographic information;

3. Total and voting age population in affected area by race;

4. Registered voters in affected area by precinct and by race;

5. Election returns and race of candidates;

6. Publicity information and participation of interested parties, e.g., newspaper articles, public hearings, public notices;

7. Notices of availability of submission to the public;

8. Minority group contacts – Name(s), address(es) and telephone number(s) of

minority individual)s) whom DOJ can contact regarding the change;

9. Old and new boundaries for annexations, district changes, etc.; and,

10. Racial makeup of areas.

Transmittal of the Preclearance Request

By Mail or Other Carrier

The preclearance submission should be addressed to the Chief of the Voting Section, and can be sent either by U.S. mail or by a private carrier, such as UPS, Federal Express, Airborne Express, or DHL. U.S. mail may be delayed due to volume and is not recommended. Whatever method of delivery is chosen, it is recommended that you obtain and retain proof of delivery. **The envelope and the first page of the submission must be marked: "Submission under Section 5 of the Voting Rights Act."** In the case of short submissions, a submission can be sent by FAX transmission, retaining proof of transmission, to: (202) 616-9514.

Submissions may also include electronically stored media (such as magnetic disks) but such submissions are subject to very detailed and specific requirements as to labeling, contents, and formatting, so a review of the DOJ requirements (posted on its website) is recommended before submitting a submission containing such media.

Use the following addresses for documentary submissions:

By U.S. Mail:

Chief, Voting Section
Civil Rights Division
Room 7254 – NWB
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

By Private Carriers:

Chief, Voting Section
Civil Rights Division
Room 7254 – NWB
Department of Justice
1800 G St., N.W.
Washington, D.C. 20006
(202) 307-2767

By Electronic Means

The DOJ Voting Section website offers the option of filing a Section 5 preclearance submission (or updating a previous filing) electronically. Such a submission may only be submitted during certain times and using a space-limited DOJ form. To utilize this feature, the submitting jurisdiction accesses the DOJ Voting Section website at the appropriate place and clicks on either the "New Submission" button or the "Update Previous Submission" button and follows the instructions. Due to limitations in the electronic submission process, the Office of the Attorney General has not made a Section 5 submission electronically. Accordingly, we have no recommendations on such submissions at the present.

The DOJ Review Process

By statute, 42 U.S.C. § 1973(c), the Department of Justice has 60 days to review a submission. Sometimes DOJ will request additional information from the submitting authority and then

restart the 60 day clock. Frequently, the DOJ reviewer will contact the submitting authority by telephone and ask for additional information and/or clarification with respect to less important matters contained in a submission. This will not restart the 60 day clock and ordinarily will not delay preclearance.

Section 51.34 of the regulations explains how to request expedited consideration of a preclearance request. Expedited consideration cannot be guaranteed, but DOJ will attempt to complete its review by the requested date in appropriate cases.

When the DOJ grants preclearance, it will send a letter so stating but will further state that their grant of preclearance does not bar litigation. In the event that expedited preclearance is granted, the DOJ preclearance letter will also reserve the right to reexamine the submission if additional information comes to the attention of the DOJ before the 60 day submission review period expires. Finally, you will want to retain the DOJ preclearance letter for future preclearance purposes because DOJ regulations require submission of details of prior preclearance information in the event that you thereafter modify your practice.

[LETTERHEAD: ALABAMA ATTORNEY GENERAL]

February 20, 2007

Mr. Robert L. McCurley, Jr.
Director
Alabama Law Institute
Post Office Box 861425
Tuscaloosa, Alabama 35486-0013

Dear Bob:

Thank you for your letter inquiring into the preclearance status of Act No. 2006-570. You are correct that the submission to the Department of Justice for review pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, has not yet been made, though this massive project has been started.

As you know, Act No. 2006-570 is the 370-page revision of Alabama's election laws. While we understand that the Act was not intended to make substantive changes to existing law, such changes were made and each change must be specifically identified and explained. Any change which is not identified and explained cannot be enforced.

You may recall that my Office contacted you for assistance in identifying the changes made by Act No. 2006-570, and that you responded by providing a book identifying some changes. During that initial conversation, or a subsequent one, it became clear that the book did not identify every change made. Specifically, the conversation concerned changes made to section 17-4-124 of the Code of Alabama

which are not explained in the book, but which came to this attention of this Office during its defense of the *Gooden v. Worley* litigation.

We have learned through experience the importance of identifying changes to existing law. In *Ward v. Alabama*, 31 F. Supp. 2d 968 (M.D. Ala. 1998) (three-judge court), the State included a red-lined version of the amended absentee voting statute with its submission, but did not incorporate it by reference in its letter. The court enjoined enforcement of the law because the change at issue was not specifically called out. The court explained that, if the State had advised the Department of Justice that all of the changes were shown on the redline, that "might" be enough. *Id.* at 972; see also *id.* at 977 (Thompson, J. concurring). Then again, in another case, incorporating the redline by reference might not be sufficient. Id. at 974. Similarly, in *Boxx v. Alabama*, 50 F. Supp. 2d 1219 (M.D. Ala. 1999), the court enjoined use of a recount procedure under the electronic voting regulations because the effect of the change was not specifically called out. The statute had been precleared, and the regulations had twice been precleared, but the State did not note that the regulations created a new basis for an election challenge. In both cases, the problem was not apparent in the abstract. Rather, only when the change was sought to be enforced, and politicians feared that the result of enforcing a nondiscriminatory provision of the law would be adverse to their interests, was Section 5 invoked.

In addition to carefully reviewing Act No. 2006-570 to identify, understand and describe the changes made, it is also necessary to research the

preclearance history of each and every statute involved. Accordingly, we have prepared a 25 page chart listing every statute renumbered, amended, or deleted by Act No. 2006-570. The chart details when each statute was enacted or last amended, as appropriate. While a number of statutes have not been enacted or changed since Alabama's coverage date, many others were. In sum, 59 different Acts are at issue in that they either added a statute, or last amended an existing statute, that is impacted by Act No. 2006-570.

Through a review of our own records and through a document request to the Department of Justice, we have ascertained that all but eight of those 59 Acts were submitted for Section 5 review and received the preclearance needed here.[1] As to the other eight Acts, a submission for each of those Acts may be necessary to facilitate the submission of Act No. 2006-570. Before preparing those submissions, however, we will look into whether any of these eight remaining Acts failed to make substantive changes requiring preclearance. We will also look into whether any of the statutes that had been impacted by these eight Acts were not substantively amended by Act No. 2006-570. It may be that not all eight submissions must be made before the review of Act No. 2006-570 can be completed.

Not only is the preclearance submission for Act No. 2006-570 standing alone a time-intensive project, but the 2006 federal, state and county

[1] An objection was interposed to portions of one Act, namely Acts 1975, No. 1196, but the objection did not impact any portion of the Act at issue in Act No. 2006-570.

elections have brought their own tremendous workload to the attorneys in my Office who have been assigned to prepare this submission. That work has manifested itself in the various election-related lawsuits as well as a higher-than-usual number of preclearance submissions which had to be made for the 2006 elections.

Many of these preclearance submissions were complicated, time-sensitive, and/or involved requests for more information from the Department of Justice. Additionally, many were connected to just a few of the election-related lawsuits that my Office has been actively defending over the past year.

Rest assured that the submission of Act No. 2006-570 has been assigned to able and experienced counsel who will do a thorough job explaining the various changes made by that Act and compiling the other information required by Department of Justice regulations. They have started this undertaking, and hope to have preclearance by sometime this summer.

The Act's effective date is January 1, 2007. This date was not realistic in light of the burdens placed on the State by federal preclearance requirements. This Act, and others with immediate effective dates, simply cannot be precleared before their effective date. In fact, there have been other preclearance matters in the past that have literally taken years, and a complete revision of Title 17 is not the sort of submission that one should expect to progress smoothly or quickly.

Your letter states that you have had inquiries from municipalities holding elections. I would recommend that you refer those municipalities to Ken Smith, Deputy Director/General Counsel at the League of Municipalities. My Office has worked with Mr. Smith on the submission of Act No. 2006-281 and the municipal portions of Act No. 2006-354. Otherwise, you should encourage the municipalities to continue following the current law until such time as the Department of Justice preclears the numerous changes made by Act No. 2006-570.

I trust this explanation is helpful to you in understanding why this project is not yet complete. Thank you, in advance, for your willingness to provide any assistance requested by this Office to answer any questions which might arise during the preclearance process. My Office will continue to work hard to obtain preclearance in a timely manner. We will let you know when the submission is made and when preclearance is achieved. In the meantime, if you have any further questions or if I can assist you in any way, I trust you will not hesitate to call on me again.

Sincerely,

Troy King
Attorney General

TRK/msf

cc: Honorable Randy Hinshaw, State Representative
Honorable Ken Guin, State Representative
Honorable Zeb Little, State Senator
Honorable Ken Smith, League of Municipalities

AMICUS CURIAE BRIEF

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(7)

No. 08-322

Supreme Court, U.S.
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In The Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF AMICUS SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION GOLDWATER INSTITUTE IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE[1]

Too often the conflict over Section 5 preclearance is falsely presented as a battle between individual rights and "state's rights." It is forgotten that the Tenth Amendment provides that powers not expressly delegated to the federal government have been reserved to the states "or to the people." The latter phrase underscores federalism's fundamental role in securing individual liberty by diffusing power between the state and federal government. *Gregory v. Ashcroft*, 501 U.S. 452, 458-459 (1991). And it highlights that the purpose of securing individual liberty is the true touchstone for harmonizing the Tenth, Fourteenth and Fifteenth Amendments. It is from this perspective that the Scharf-Norton Center for Constitutional Litigation Goldwater Institute challenges the continued legitimacy of preclearance.

The Scharf-Norton Center for Constitutional Litigation is a division of the Goldwater Institute, which is a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. The Goldwater Institute advances public policies that

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[1] Counsel of record for all parties have either filed a blanket consent letter to amicus briefs in this case or they have received notice at least 10 days before the due date of the amici's intention to file this brief and have consented. The parties' letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the amici and their counsel, has made a monetary contribution to the preparation or submission of this brief.

further the principles of limited government, economic freedom and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the features of our state and federal constitutions that directly and structurally protect individual rights, including the Bill of Rights, the doctrine of separation of powers and federalism. To ensure its independence, the Goldwater Institute neither seeks nor accepts government funds, and no single contributor has provided more than five percent of its annual revenue on an ongoing basis.

As an Arizona-based institution, the Goldwater Institute is deeply concerned about how Section 5 preclearance impacts Arizona and Arizonans. 42 U.S.C. § 1973c (West 2009). Three decades of preclearance have forced Arizona to abandon the ideal of color-blind government in favor of racialist redistricting. Most recently, in 2000, Arizona's constitution was amended by citizen's initiative to require competitive legislative redistricting by a nonpartisan, independent state agency known as the Independent Redistricting Commission. Ariz. Const. Art. 4, Pt. 2, Sec. 1 (West 2009); *see generally* Edward Blum, *The Unintended Consequences of Section 5 of the Voting Rights Act* 20-27 (AEI Press, Washington D.C., 2007), available at http://www.aei.org/docLib/20080818_UnintendedConsequencesBlum.pdf (last visited February 18, 2009). There is no evidence that this constitutional amendment was in any way motivated by active state-sponsored invidious discrimination

against protected classes. Nevertheless, in 2002, the Justice Department refused preclearance and required Arizona's Independent Redistricting Commission to abandon a redistricting map that would have maximized competitiveness in favor of one that maximized the electoral chances of various incumbent minority candidates. Blum, *Unintended Consequences*, at 26-27 (citing Robbie Sherwood, "Corr Consultants Admit Flaws Affected Redistrict Maps," Arizona Republic, May 6, 2002, 4B; Howard Fischer, "Redistricting Lines Rejected; New Plan Needed by Next Week for Federal Review," Arizona Daily Star, May 21, 2002, 4A). As a result, the need to secure preclearance caused the goal of maximizing minority representation to trump Arizona's state constitutional obligation to ensure competitive elections.

Such systematically racialist federal interference with Arizona's legitimate constitutional structures is grossly disproportionate to preclearance's asserted goal of securing equal voting rights from active state-sponsored invidious discrimination. Arizona, after all, was not one of the original covered states. In fact, three years before the Voting Rights Act was enacted, Arizona voluntarily repealed all of its historical Jim Crow-like laws. Susan Falck, *Jim Crow Legislation Overview: Jim Crow Outside the South*, http://www.jimcrowhistory.org/scripts/jimcrow/lawsoutside.cgi?state=Arizona (last visited February 16, 2009). There is no evidence that Arizona engages in active state-sponsored invidious discrimination to an extent that is remotely comparable in magnitude

to the original covered states. For this reason, the preclearance penalty box is no more justified for Arizona and its political subdivisions than it is for Appellant.

Because federalism is meant to protect individual liberty, state and local governments should not have a legal monopoly on protesting preclearance. Arizonans, who refuse to sacrifice their freedom and equality to an anachronistic obsession with race, deserve a voice as well. That is why the Institute filed this brief in support of Appellant.

SUMMARY OF ARGUMENT

Given the absence of significant evidence of active state-sponsored invidious discrimination in Arizona and other covered states, § 5 preclearance violates the Fourteenth Amendment because "practical experience" dictates there is no longer extraordinary justification for the racialism preclearance systematically promotes.

The "federalism costs" exacted by § 5 preclearance are no longer justified because preclearance unconstitutionally commandeers traditional attributes of state sovereignty without congruence or proportionality to the goal of remedying active state-sponsored invidious discrimination.

ARGUMENT

When the Voting Rights Act was enacted in 1965, Section 5 preclearance might have been the only feasible means by which equal voting rights under the Fifteenth Amendment could be enforced. But the days of the literacy test are long over. Minority political progress is no longer "modest and spotty." *City of Rome v. U.S.*, 446 U.S. 156, 181 (1980) (citations omitted). Pretending otherwise is not consistent with the touchstone of "practical experience," which the Court applied when it upheld preclearance nearly a half-century ago in *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966). It is fantasy.

Commandeering the traditional attributes of state sovereignty through preclearance is no longer a reasonable prophylaxis to prevent active state-sponsored invidious discrimination, much less a congruent or proportionate means of effectuating the remedial purpose of the Fifteenth Amendment to the U.S. Constitution. Allowing preclearance to continue will only backfire by continuing to balkanize Americans along racial and ethnic lines. And it will also establish the dangerous precedent that Congress may needlessly disregard the Tenth Amendment, so long as incantations are offered to the Fifteenth Amendment.

For these reasons, the "practical experience" that animated *Katzenbach* dictates that we have arrived at the termination point of preclearance. It is time to liberate covered jurisdictions to exercise their sovereign powers in a manner that treats citizens as

unique individuals, rather than protected class cogs. The Court should strike down Section 5 preclearance as incompatible with principles of equality under the law and federalism.

I. PRECLEARANCE VIOLATES THE FOURTEENTH AMENDMENT BECAUSE "PRACTICAL EXPERIENCE" DICTATES THERE IS NO LONGER EXTRAORDINARY JUSTIFICATION FOR THE RACIALISM PRECLEARANCE SYSTEMATICALLY PROMOTES.

Preclearance has been on a collision course with the Fourteenth Amendment from its inception. The Fourteenth Amendment was meant to secure the ideal of "color-blind" government. *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Under the Fourteenth Amendment, "Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools . . . it may not separate its citizens into different voting districts on the basis of race." *Miller v. Johnson,* 515 U.S. 900, 911 (1995) (citations omitted). Equality under the law demands that "government must treat citizens as individuals, not 'as simply components of a racial, religious, sexual or national class.'" *Id.* In contrast to these principles, preclearance systematically promotes an obsession with racial politics.

The 2006 reauthorization of preclearance should be regarded as a presumptively invalid, purposeful

decision to encourage state racialism. With or without *de jure* racial gerrymandering, it is no mystery that preclearance has caused and will continue to cause covered states to consciously segregate or consolidate voters based predominantly on their membership in one or more protected classes. Abigail Thernstrom, Section 5 of the Voting Rights Act: By Now, a Murky Mess, 5 Georgetown J. Law & P. Pol. 41, 61-72 (2007), available at http://www.manhattan-institute.org/pdf/_journ_of_law-section5.pdf (last visited February 18, 2009); Blum, *Unintended Consequences*, *inter alia*. Moreover, preclearance's purposeful promotion of state racialism is confirmed by the fact that the Voting Rights Act was amended explicitly to protect minority preferences in representation, thereby overturning *Georgia v. Ashcroft*, 539 U.S. 461 (2003). *See* 42 U.S.C.A. § 1973c(b) (West 2009). Such government-sponsored racialism stigmatizes everyone because it entails the "offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Quoting Miller*, 515 U.S. at 912 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). Accordingly, preclearance should be seen as presumptively invalid under general principles of equal protection. *Cf. Shaw*, 509 U.S. at 642-44. Correspondingly, the Court should require "extraordinary justification" for preclearance to withstand strict scrutiny under the Fourteenth Amendment. *Miller*, 515 U.S. at 911. Moreover, as discussed below, the fact that preclearance is purportedly remedial should not save it from the

same fate as the literacy test. "Practical experience" precludes a finding of "extraordinary justification" for Section 5 preclearance.

A. THE 2006 REAUTHORIZATION OF SECTION 5 PRECLEARANCE LACKS EXTRAORDINARY JUSTIFICATION BECAUSE ACTIVE STATE-SPONSORED INVIDIOUS DISCRIMINATION HAS DIMINISHED TO THE POINT OF INSIGNIFICANCE.

Because the reauthorization of preclearance is presumptively invalid, Congressional findings of necessity or remedial purpose are not entitled to deference. *Cf. Abrams v. Johnson*, 521 U.S. 74, 86 (1997) (refusing to require district court to defer the legislature where the legislature was alleged to have engaged in unconstitutional conduct triggering strict scrutiny). Instead, the Court should independently assess the evidence in the record to determine whether extraordinary justification exists for preclearance's promotion of state racialism. That assessment should lead to the finding that active state-sponsored invidious discrimination of the sort originally targeted by *Katzenbach* has almost completely disappeared and, along with it, any "extraordinary justification" to reauthorize preclearance has evaporated.

The Congressional Record shows that by 2005 "there was no quantifiable difference in the voting rights exercised by minorities in covered jurisdictions

than in non-covered jurisdictions." Edward Blum, Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act*, Study Submitted to the United States Senate Committee on the Judiciary (AEI May 17, 2006), at 2-3, available at http://www.aei.org/docLib/20060515_BlumCampbellreport.pdf (last visited February 18, 2009). Moreover, "[s]ince 1982, more lawsuits brought under section 2 end[ed] with a determination of liability . . . in non-covered jurisdictions than in covered ones." *Id.* at 11 (citing Voting Rights Initiative at the University of Michigan Law School, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act, Study Submitted to the U.S. House Subcommittee on the Constitution (2006)). Ironically, to the extent that "discrimination" under the Act still occurs in covered states, it appears to furnish equal opportunity for victimhood. Blum, *Assessment of Voting Rights Progress*, at 12 (citing American Civil Liberties Union, "The Case for Extending and Amending the Voting Rights Act") (observing, in covered states, whites appear to have brought just as many successful Section 2 lawsuits as have protected minorities since 1982). Finally, the Justice Department's Section 5 preclearance objection rate of 4.0 percent, between 1965 and 1970, was more than 25 times greater than the 0.153 percent rate between 1996 and 2005. *Id.* at 9 (citing Bradley J. Schlozman, "Administrative Review of Voting Changes," Testimony before the Subcommittee of the Constitution, Committee on the

Judiciary, House of Representatives, October 25, 2005).

Active state-sponsored invidious discrimination against protected classes is all but extinct. For this reason, preclearance's continued systematic promotion of state racialism lacks "extraordinary justification." In fact, as discussed below, preclearance itself appears to be a significant source of what little state-sponsored discrimination still exists.

B. THE 2006 REAUTHORIZATION OF SECTION 5 PRECLEARANCE LACKS EXTRAORDINARY JUSTIFICATION BECAUSE PRECLEARANCE ITSELF HAS CAUSED AND CONTINUES TO THREATEN ACTIVE STATE-SPONSORED INVIDIOUS DISCRIMINATION.

Despite the nation's obvious advance away from Jim Crow, government remains as fixated on race as ever. This ironic state of affairs suggests that preclearance itself has become the problem, rather than the solution. Indeed, as illustrated by the impact of *Miller v. Johnson*, continued enforcement of Section 5 preclearance has generated active state-sponsored discrimination on a truly tragic scale.

On June 29, 1995, *Miller* overturned a longstanding federal preclearance enforcement policy that essentially compelled race-based redistricting. *Id.*, 515 U.S. at 927 (holding "the Justice Department's implicit command that States engage in presumptively

unconstitutional race-based districting" unconstitutionally brings the Fifteenth Amendment "into tension with the Fourteenth Amendment") (citations omitted). The effect of *Miller* on preclearance enforcement policy was immediate – causing a precipitous drop in subsequent Justice Department preclearance objections. And a closer look at the data confirms that this inference does not invoke *post hoc ergo proctor hoc*.

It is as if *Miller* turned off a spigot of unconstitutional enforcement actions by the Justice Department. Between 1982 and 2005, approximately 672 of 753 Justice Department objections, nearly *90 percent* of the total, predate *Miller*.[2] Blum, *Assessment of Voting Rights Progress*, at 11 (citing Bradley J. Schlozman, "Administrative Review of Voting Changes," Testimony before the Subcommittee of the Constitution Committee on the Judiciary, House of Representatives, October 25, 2005). More than *eight times* as many preclearance objections were lodged by the Justice Department *before Miller* as *after*. *Id.* The average of 51 objections per year prior to *Miller* dropped to a subsequent average of 8 per year. *Id.* In the decade preceding *Miller*, the Justice Department lodged no fewer than 495 objections to preclearance applications. *Id.* By contrast, in the decade following *Miller*, the Justice Department lodged no more than

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[2] The data presented assume that 10 of the 19 Justice Department objections lodged in 1995 pre-date *Miller*.

79 objections. *Id.* Finally, there is not a single year after 1995 in which as many objections were lodged by the Justice Department as in *any* year preceding 1995. *Id.* These statistics are not better explained by random or exogenous cultural, social or political factors than by the natural impact of the Court's decision in *Miller* on Justice Department policy.

Given the sudden and dramatic drop in preclearance objections following *Miller*, which is consistent across ideologically distinct presidential administrations, it stands to reason that the bulk of the pre-*Miller* preclearance objections were actually the product of the very discriminatory policies that were overturned in *Miller*. In other words, for more than a decade, Section 5 preclearance systematically enabled and promoted pervasive unconstitutional racial discrimination – not unlike a facially race-neutral literacy test. And most tragically, Congress likely relied upon unconstitutional discrimination *caused by preclearance* to justify reauthorizing preclearance in 2006.

As observed by Justice Kennedy in his concurrence to *Georgia v. Ashcroft*, "There is a fundamental flaw, I should think, in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive." *Id.*, 539 U.S. at 491 (Kennedy, J., concurring). The fundamental flaw of Section 5 preclearance is that it is a race conscious policy that Congress reauthorized past its natural termination point.

Accordingly, the Court should recognize that the 2006 reauthorization of preclearance violates the Fourteenth Amendment because it purposely encourages state racialism without extraordinary justification. Preclearance can only do constitutional mischief playing with racialist fire because it is a solution in search of a problem.

II. PRECLEARANCE UNCONSTITUTIONALLY COMMANDEERS TRADITIONAL ATTRIBUTES OF STATE SOVEREIGNTY WITHOUT CONGRUENCE OR PROPORTIONALITY TO THE GOAL OF REMEDYING ACTIVE STATE-SPONSORED INVIDIOUS DISCRIMINATION.

Preclearance is not a run-of-the-mill Congressional incursion into state sovereignty. The Court has previously observed that preclearance exacts significant "federalism costs." *Miller*, 515 U.S. at 926. Indeed, no one disputes that the powers reserved to the states under the Tenth Amendment historically include the power to regulate the right of suffrage. *Carrington v. Rash*, 380 U.S. 89, 91-92 (1965). Correspondingly, by dictating the terms on which such power can be exercised, it is readily apparent that preclearance commandeers state sovereign power much like the federal laws declared unconstitutional under the Tenth Amendment in *New York v. U.S.*, 505 U.S. 144 (1992), and *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976). Nevertheless, the lower court decided that *Katzenbach* foreclosed the possibility of

raising federalism objections to preclearance. The lower court also distinguished the proportionality test in *City of Boerne v. Flores*, 521 U.S. 507 (1997), on the grounds that heightened scrutiny was only required for enforcement legislation under the Fourteenth Amendment. The lower court was mistaken in these rulings.

Congress is not entitled to more deference when exercising its enforcement authority under the Fifteenth Amendment than under the Fourteenth Amendment. Given that race and ethnicity are increasingly viewed as social and cultural constructs rather than biological categories, there is an inherent and growing risk of preclearance imbuing the Fifteenth Amendment with new substantive rights for classes of individuals not originally encompassed by its original meaning or purpose. *Cf. McMillan v. City of New York*, 253 F.R.D. 247, 249-56 (E.D.N.Y. 2008) (discussing the conceptual and legal difficulties involved in defining racial categories). This risk is magnified by the Justice Department's history of officially interpreting preclearance to mandate race-based gerrymandering – effectively granting special electoral privileges to members of protected classes (usually incumbents).

If anything, preclearance may pose a greater threat to vital constitutional principles than legislation enforcing the Fourteenth Amendment. Aggressive federal efforts to enforce the Fifteenth Amendment through preclearance can cause unconstitutional "tension with the Fourteenth Amendment," by forcing

states to choose between race consciousness and race neutrality. *Miller*, 515 U.S. at 927. This "Hobson's choice" is both fundamentally unfair and an invasion of state sovereignty. By contrast, it is difficult to imagine how legislation meant to enforce the Fourteenth Amendment could generate a similar constitutional conundrum. Accordingly, to the very extent that the stringency of judicial review should be elevated under the Tenth Amendment to counteract an elevated risk of Congressional overreaching, as posited by the lower court, *City of Boerne*'s congruence or proportionality standard must be seen as setting the floor for judicial review of preclearance.

Applying *City of Boerne*, there should be no doubt that the 2006 reauthorization of preclearance disproportionately commandeers traditional attributes of state sovereignty in violation of the Tenth Amendment. As discussed in the preceding section, the extraordinary circumstances that prompted *Katzenbach* to embrace preclearance as a reasonable remedy under the Fifteenth Amendment no longer exist because there is little, if any, active state-sponsored invidious discrimination against members of protected classes. Moreover, preclearance is more likely the *cause* of present-day invidious discrimination than the remedy, because it has systematically encouraged states to engage in unjustifiable racialism in redistricting and outright racial gerrymandering. A remedial law that actually promotes the evil it is supposed to remedy obviously "reflects a lack of

proportionality or congruence between the means adopted and the legitimate end to be achieved." *Quoting City of Boerne*, 521 U.S. at 533. For this reason, the Court should declare the 2006 reauthorization of Section 5 preclearance inconsistent with the "vital principles necessary to maintain separation of powers and the federal balance." *Id.* at 536.

CONCLUSION

The Court has held that "[t]he purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia*, 539 U.S. at 490. Unfortunately, since 1982, Section 5 preclearance has systematically backfired against this purpose. Instead of preventing and remedying active state-sponsored discrimination against protected classes, preclearance has promoted a new kind of invidious state racialism and racial gerrymandering.

Six years ago, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court observed that all "race-conscious" policies must eventually "have a termination point." A race-conscious law that systematically strikes at the heart of federalism and equal protection should end sooner rather than later. Accordingly,

the Court should declare that preclearance reached its termination point long ago.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE* OF THE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation ("SLF"), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues and litigates regularly before the Supreme Court of the United States. In particular, SLF advocates for a color-blind interpretation of the Constitution. To that end, SLF has participated in litigation all over the country including in this Court in such cases as *City of Richmond v. J.A. Croson Co.*, 488 U.S. 49 (1989), *Ne. Fla. Ch. of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993) and *Adarand v. Mineta*, 534 U.S. 103 (2001).

SLF has a direct interest in this case, as it objects to the 2006 reauthorization of Section 5 of the Voting Rights Act on the basis that it runs contrary to the principles of race neutrality to which it is dedicated and to the American ideal of individual equality to which SLF is profoundly committed. For these reasons, SLF respectfully submits this brief in support of Appellant and urges the Court to reverse the judgment below.

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

INTRODUCTION

This appeal arises out of the district court's determination that (1) Appellant Northwest Austin Municipal Utility District Number One is not entitled to "bail out" of coverage under Section 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973c; and (2) Section 5 of the VRA is a constitutional exercise of Congress' power under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. *See Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) ("*NAMUDNO*"). As Appellant has persuasively demonstrated, Section 5 "continues to impose an unparalleled federal intrusion on the contemporary generation in certain parts of the country" that—for numerous reasons taken both individually and together—cannot withstand constitutional muster. Brief of Appellant at 2, *Northwest Austin Municipal Utility District Number One v. Holder* (No. 08-322) (Feb. 19, 2009) ("App. Br."). Moreover, Appellant has shown that it should be fully entitled to bail out of Section 5 coverage under any reasonable—and constitutional—reading of the statute. *See id.* at 14-27.

Amicus SLF fully subscribes to the arguments made in the Appellant's brief, but writes separately to emphasize one particularly troubling and constitutionally suspect aspect of the 2006 reauthorization of Section 5: the scant evidentiary record allegedly supporting reauthorization bears no resemblance to the extraordinary factual record that was necessary to support Section 5 at its initial enactment. Congress' failure to compile the factual

record required by this Court's precedents interpreting congressional power to enact "enforcement" legislation under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, and its concomitant failure to tailor any remedial scheme to account for the factual differences that do exist, render Section 5 constitutionally unsustainable.

The Civil War Amendments provide individuals with a substantive guarantee, but they also provide Congress with an extraordinary power: to "enforce" those Amendments' substantive guarantees through "appropriate legislation." *See* U.S. Const. amends. XIV § 5, XV § 2. This power, while broad, "is not unlimited." *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). Thus, virtually since the time the Amendments were enacted, this Court has carefully scrutinized each such exercise of congressional power to determine whether Congress is actually "enforcing" the rights granted in the Amendments or is instead "changing what the right is." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

Congress enacted the VRA to enforce the substantive guarantee of the Fifteenth Amendment—"to banish the blight of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The "preclearance" procedure set out in Section 5 of that Act, however, was only one part of the VRA's "complex scheme of stringent remedies aimed at areas where voting discrimination ha[d] been most flagrant."[2]

2. The central enforcement provision in the VRA is Section 2, 42 U.S.C. § 1973a. Section 2 and Section 5 "combat different

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Id. at 315. Indeed, it was designed with the singular purpose of foreclosing the use of obstructionist tactics and discriminatory devices to evade court judgments enforcing the Fifteenth Amendment. *See id.* at 309 (citing the "insidious and pervasive evil which had been perpetrated in certain parts of our country through unremitting and ingenious defiance of the Constitution"). Prior to Section 5, nothing prevented State and local officials from implementing new intentionally discriminatory voting laws as a means of evading court orders and decrees. Congress thus enacted Section 5 as an anti-evasion provision to end this practice. *See* S. Rep. No. 89-162, at 33 (1965) (there was "little basis for supposing that without action, the States and subdivisions affected will themselves remedy the present situation").

Despite these noble goals, the Court did not allow Section 5 to escape close scrutiny. Adhering closely to analyses conducted in reviewing other "enforcement" legislation, the Court reviewed the evidence on which Congress relied to justify the need for the VRA in

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evils and, accordingly, impose very different duties upon the States." *Reno v. Bossier Parish*, 520 U.S. 471, 477 (1997) ("*Bossier Parish I*"). Section 2 is directed at existing voting practices that "minimize or cancel out the voting strength and political effectiveness of minority groups." S. Rep. No. 97-417 at 28, 1982 USCCAN 177, 205 (1982). Section 2 also applies nationwide, "was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute," *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980), and is not at issue in this appeal except to the extent that its presence undermines the need for the extraordinary Section 5 remedy.

general and Section 5 in particular and held Congress responsible for tailoring any legislation to target only those areas where "enforcement" legislation was "appropriate." Thus, although Section 5's remedial provision was "an uncommon exercise of congressional power," *Katzenbach*, 383 U.S. at 334, and represented "an extraordinary departure from the traditional course of relations between the States and the Federal Government," *Presley v. Etowah County*, 502 U.S. 491, 500-501 (1992), the Court found it justified because Congress had compiled a vast record disclosing the unflinching resistance of certain states to permit minority citizens to register and vote, focusing in particular on statistical evidence showing gross disparities between the ability of African-Americans and whites to exercise the franchise. *Katzenbach*, 383 U.S. at 334. The Court also found Section 5 sustainable because it was targeted only at those areas where remedial action was the most appropriate and only for a limited period of time. *See id.* at 314, 328, 330.

Following subsequent reauthorizations in 1970, 1975, and 1982, *see* Pub. L. No. 91-285, 84 Stat. 314 (1970); Pub. L. No. 94-73, 89 Stat. 402 (1975); Pub. L. No. 97-205, 96 Stat. 131 (1982), during which time this Court repeatedly acknowledged the substantial costs Section 5 imposes on our federal system,[3] Congress

3. *See also Berry v. Doles*, 438 U.S. 190, 200-201 (1978) (Powell, J., concurring) ("It must be remembered that the [VRA] imposes restrictions unique in the history of our country on a limited number of selected States."); *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (emphasizing the "federalism costs exacted by

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again reauthorized Section 5 in 2006. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act and Reauthorization Amendments of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006). In adding another 25 years to Section 5's life, however, Congress did not heed the warnings implicit in this Court's enforcement clause precedents by compiling the necessary evidence or tailoring the remedy to fit a demonstrated problem.

Indeed, the 2006 reauthorization and the evidence Congress marshaled to support it make clear that Section 5 has come completely untethered from its foundation. Congress offered no evidence of the continued use of literacy tests, poll taxes, or other "tests and devices" that the *Katzenbach* Court found "relevant to voting discrimination because of their long history as a tool for perpetrating the evil." *Katzenbach*, 383 U.S. at 330. Nor did Congress offer evidence to support its conclusory assertions that the covered jurisdictions would, in the absence of Section 5, revert back to the "extraordinary stratagem" of perpetuating voting discrimination by crafting new voting laws around federal court rulings. To the contrary, the congressional

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§ 5 preclearance"); *Bossier Parish I*, 520 U.S. at 480 (noting the "serious federalism costs already implicated by § 5 preclearance"); *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) ("[T]he Act, which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial federalism costs.") (quotations omitted); *Reno v. Bossier Parish*, 528 U.S. 320, 336 (2000) ("*Bossier Parish II*") (highlighting the "substantial federalism costs that the preclearance procedure . . . exacts").

record contained compelling statistical evidence demonstrating significant progress in minority voting rights, including dramatic increases in voter registration and turnout in covered jurisdictions and dramatic decreases in the disparities between minority and white voter registration and turnout in those jurisdictions.

While Congress did compile some evidence in an attempt to justify its actions, the evidence it gathered wholly failed to disclose a pervasive practice of constitutional violations by state actors. Nor did the congressional record disclose evidence of states flouting the Constitution through obstructionist tactics and discriminatory devices designed to evade standing court judgments enforcing the Fifteenth Amendment. In the end, the present record bears no resemblance to the record initially supporting Section 5, and is plainly insufficient to sustain Section 5's extraordinary remedy.

Congress also wholly failed to satisfy the second part of its responsibility under this Court's precedents: to tailor any legislation it did enact. In contrast to the process Congress undertook when originally enacting Section 5 in 1965, in reauthorizing Section 5 Congress did not target only those States with the worst voting records, did not consider the sufficiency of narrower remedies, and did not provide any meaningful temporal limitation.

The method by which this Court has analyzed prior enforcement legislation demonstrates the constitutional infirmity of present-day Section 5. Had Congress paid more attention to its evidentiary and tailoring responsibilities, it would have allowed Section 5 to

sunset or modified its scope to account for the vast changes in the voting landscape since 1965. It did neither, and this Court should find Section 5 unconstitutional.

ARGUMENT

I. SECTION 5 IS JUSTIFIABLE ONLY UNDER THE EXTRAORDINARY CIRCUMSTANCES THAT LED TO ITS ENACTMENT.

A. This Court's Decisions Dictate That Enforcement Legislation Must Be Subjected to Stringent Review to Determine its Necessity.

The Fifteenth Amendment to the United States Constitution contains an important substantive guarantee: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. But of special importance to this case, it also grants Congress the power to "enforce" that guarantee "by appropriate legislation." U.S. Const. amend. XV, § 2. This extraordinary "enforcement" power—granted to Congress in each of the Civil War Amendments overrides traditional deference to state sovereignty within the federal system.

Though this grant of power could have been interpreted as unreviewable, this Court made clear early on that Congress did not have free rein in crafting "enforcement" legislation. *See, e.g., Ex parte Virginia*, 100 U.S. 339 (1879) (stating that "enforcement"

legislation must be "appropriate," which requires that it be "adapted to carry out the objects the amendments have in view" and that they "tend[] to enforce submission to the prohibitions they contain"). Indeed, scarcely more than a decade after the Civil War Amendments were enacted, this Court found legislation enacted under the enforcement clause of the Fourteenth Amendment was both subject to judicial review and unconstitutional. *See Civil Rights Cases*, 109 U.S. 3 (1883). In those cases, the Court laid down the groundwork for review that has been followed in subsequent decisions, finding that Congress must compile a factual record showing a particularized need for the legislation, and that the factual record must disclose evidence of violations of the substantive guarantees of the particular amendment that Congress seeks to enforce. *Id.* at 14 (finding Congress' reliance on its enforcement clause power unjustified where "[a]n inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the states").

In *Katzenbach*, the Court, in reviewing the constitutionality of the VRA, again demonstrated that it will give close attention to the particular evidence relied upon by Congress to justify its actions under the enforcement clauses. In upholding Section 5's constitutionality, this Court looked closely at the facts Congress had assembled, highlighting the "exceptional conditions" and "unique circumstances" surrounding enactment as support for its constitutionality. 383 U.S. at 334-35. In the end, the Court found that Congress had compiled sufficient evidence to show that enforcement legislation was appropriate, including vast

amounts of evidence of conduct violating the Fifteenth Amendment. Thus, the "exceptional conditions c[ould] justify legislative matters not otherwise appropriate." *Id.* at 334.

Since *Katzenbach*, this Court has held true to the analytic framework first laid down in the *Civil Rights Cases*, subjecting enforcement legislation to scrutiny not applicable to other congressional enactments. In the second constitutional challenge to Section 5, this Court again specifically examined the evidence adduced by Congress to justify Section 5's reauthorization, finding it to be similar in nature to that relied upon to initially justify Section 5. *See City of Rome v. United States*, 446 U.S. 156, 180-82 (1980). Writing in that case, then-Justice Rehnquist remarked that the Court's enforcement clause precedents "are carefully formulated around a historic tenet of the law that in order to invoke a remedy, there must be a wrong—and under a remedial construction of congressional power to enforce the Fourteenth and Fifteenth Amendments, that wrong must amount to a constitutional violation." *Id.* at 213 (Rehnquist, J., dissenting).

In *Boerne*, the Court again acknowledged the requirement that Congress compile specific types of evidence, noting that congressional action is only appropriate under the enforcement clauses where it "deters or remedies constitutional violations." 521 U.S. at 518. Indeed, the *Boerne* Court closely examined the precise facts on which Congress relied to support the need for the Religious Freedom Restoration Act ("RFRA") including whether any unconstitutional conduct was alleged—and compared the lack of factual

evidence in that case to the wealth of evidence compiled to support the VRA in *Katzenbach*. *Id.* at 530-32. Subsequent decisions have applied this strict evidentiary requirement to the review of every piece of enforcement legislation. *See, e.g., Bd. of Trs. of U. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (noting that the Court must "examine whether Congress identified a history and pattern of unconstitutional" action in order to justify "enforcement" legislation since "Congress' § 5 authority is appropriately exercised only in response to state transgressions") (citing *Fla. Prepaid Post-Secondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 640 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000)).

B. Congress Must Meaningfully Limit the Scope of Enforcement Legislation.

The principle that Congress may only respond to some constitutional "wrong" imposes a correlative limitation on "enforcement" legislation: it must be closely tailored to the particular facts justifying its enactment. In the *Civil Rights Cases*, this Court objected to the law in question in part based on a failure to limit its geographical reach: it "applie[d] equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in states that may have violated the prohibition of the amendment." 109 U.S. at 14. The Court engaged in a similar analysis in *Katzenbach*, considering the temporal limitation of Section 5 (five years), the fact that less intrusive remedies had failed, and Section 5's limited geographic scope (only those jurisdictions showing the most egregious record of constitutional violations) as factors favoring its constitutionality. *See* 383 U.S. at 313-14, 328.

And in *Boerne*, the Court explicitly stated that enforcement legislation must, over time, "be adapted to the mischief and wrong which the Amendment was intended to provide against." 521 U.S. at 532. Accordingly, the Court found it relevant that RFRA had no termination date and applied equally across the country despite a lack of findings of constitutional violations nationwide, *id.* at 532-33, explaining that "[w]here . . . a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate." *Id.* at 533. *See also Garrett*, 531 U.S. at 372-74 (lack of geographic limitation demonstrated lack of tailoring). In a like manner, the Court has found congressional efforts to consider less intrusive remedies to be an important factor in analyzing the constitutionality of enforcement legislation. *See, e.g., Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738-39 (2003).

C. Section 5 Was Constitutional At Its Enactment Only Because of Extraordinary Circumstances.

Using these principles to scrutinize Section 5, the *Katzenbach* Court found that the factual record Congress compiled clearly demonstrated the necessity of enforcement legislation. The vast record of discriminatory conduct demonstrated the naked desire of certain states to deprive African-Americans the ability to vote. Following passage of the Fifteenth Amendment, many Southern states responded by enacting numerous tests and devices—such as white primaries, poll taxes, and literacy tests designed to deny African-Americans

of the right to vote. *See Katzenbach*, 383 U.S. at 311-12. The Court explained that literacy tests were one of the primary mechanisms[4] used to deny the franchise to African-Americans because of the wide disparity in literacy rates between African-Americans and whites at the time. *Id.* at 310-11. At the same time, those states enacted laws to protect illiterate whites' right to vote, including "grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter." *Id.* at 311. To make matters worse, the states administered these tests in a discriminatory fashion. *Id.* at 312-13; *see also Rice v. Cayetano*, 528 U.S. 495, 513 (2000) ("Though the commitment [of the Fifteenth Amendment] was clear, the reality remained far from the promise. Manipulative devices and practices were soon employed to deny the vote to blacks." (citing *Katzenbach*, 383 U.S. at 311-12)).[5]

4. Literacy tests were employed in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia. *Katzenbach*, 383 U.S. at 310.

5. Senator Ben Tillman, the "dominant political figure" in the South Carolina Constitutional Convention of 1895, explained the aim of literacy tests as follows: "'[T]he only thing we can do as patriots and as statesmen is to take from [the 'ignorant blacks'] every ballot that we can under the laws of our national government.'" *Katzenbach*, 383 U.S. at 310 n.9 (quoting Journal of the Constitutional Convention of the State of South Carolina 464 (1895)). The *Katzenbach* Court noted that "[h]e was equally candid about the exemption from the literacy test for persons who could 'understand' and 'explain' a section of the state constitution: 'There is no particle of fraud or illegality in it. It is just simply showing partiality, perhaps, [laughter,] or discriminating.'" *Id.*

Over the years, this Court had struck down many of these "tests and devices" as unconstitutional, *see Katzenbach*, 383 U.S. at 311-12, but this was insufficient to ensure equal access to the polls. Thus, beginning in 1957, Congress enacted several statutes designed to "facilitat[e] case-by-case litigation against voting discrimination." *See id.* at 313. But this too proved "ineffective for a number of reasons." *Id.* at 314. In particular, litigation of voter discrimination cases "ha[d] been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings." *Id.* And even when such cases resulted in favorable decisions, "some of the States affected . . . merely switched to discriminatory devices not covered by the federal decrees or . . . enacted difficult new tests designed to prolong the existing disparity between white and Negro registration." *Id.* Other localities simply "defied and evaded court orders" or "closed their registration offices to freeze voting rolls." *Id.*; *see also* House Committee Hearings at 5 (1965) (Statement Of The Honorable Nicholas deB. Katzenbach, Attorney General Of The United States) ("Three times since 1956, the Congress has responded. Three times, it has adopted the alternative of litigation, of seeking solutions in our judicial system. But three times since 1956, we have seen that alternative tarnished by evasion, obstruction, delay, and disrespect."); Oral Argument Tr. at 47, *Riley v. Kennedy*, 128 S. Ct. 1970 (No. 07-77) (2008) (comparing the Section 5 problem to a "game of Whac-A-Mole").

It was in response to this "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the

face of adverse federal court decrees" that Congress enacted Section 5. *Katzenbach*, 383 U.S. at 335; *see also id.* at 311 (cataloguing the "variety and persistence" of unlawful voting techniques); *id.* at 309 n.5 (citing Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 Stan. L. Rev. 1, 10 (1965) ("In the past those intent on denying the rights guaranteed by the fifteenth amendment have managed to avoid court decrees and legislation by contriving new stratagems.")). The Court endorsed Congress' determination that "covered jurisdictions" would continue to "try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself," *id.*, and thus "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting," *id.* at 328. *See also id.* (describing the "inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in [voting discrimination] lawsuits").

Importantly, the *Katzenbach* Court highlighted the inadequacy of the case-by-case approach by presenting a wealth of statistical evidence regarding (1) voter registration rates, and (2) voter turnout levels, both of which demonstrated continuing and pervasive voter discrimination. The Court highlighted evidence the Attorney General presented to Congress showing that African-American voter registration rates ran *approximately 50 percentage points lower* than white voter registration in several states. *See id.* at 313. The persistence of such wide disparities demonstrated that discrimination was widespread. The Court also noted concrete examples, showing that registration rates of

African-Americans in Alabama rose "only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964." *Id.* at 313. The absence of progress and the failure to remedy these wide disparities demonstrated that a new approach was necessary. Finally, the Court observed that voter turnout levels in "covered jurisdictions" were at least 12 points below the national average in the 1964 presidential election. *Id.*; *see also* H.R. Rep. No. 91-397, 1970 USCCAN 3277, 3278 (1969) (finding that the three prior civil rights acts "yielded insignificant gains in the non-white voter registration").

Overall, the *Katzenbach* Court considered these statistics, along with the continued "use of tests and devices," to be "evidence of actual voting discrimination." 383 U.S. at 330. *See also id.* ("Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters."). At bottom, Section 5 was necessary because "minorities were openly denied the right to participate in the political process by State and local officials." H.R. Rep. No. 109-478, at 7 (2006).

Finally, Congress recognized that its authority to enforce the Fifteenth Amendment only goes so far. In contrast to the law at issue in the *Civil Rights Cases*, the Court found that Section 5 applied only in those places where evidence of persistent, purposeful discrimination existed. *Compare* 383 U.S. at 330 ("It

was . . . permissible to impose the new remedies on the few remaining [covered jurisdictions], at least in the absence of proof that they have been free of substantial voting discrimination in recent years."), *with Civil Rights Cases*, 109 U.S. at 14 (finding the law unconstitutional where "[i]t applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in states that may have violated the prohibition of the amendment."). Likewise, Congress understood that Section 5 was to be a temporary measure that would last only as long as the conditions making it necessary existed: "When the Voting Rights Act was enacted in 1965, the Congress expected that within a 5-year period negroes would have gained sufficient voting power in the states affected so that special federal protection would no longer be needed." H.R. Rep. No. 91-397, 1970 USCCAN at 3281. Such awareness of the bounds of the power to "enforce" was again found to be an important aspect of the Court's determination.[6]

6. In the years since *Katzenbach*, this Court has reiterated several times that the decision as to Section 5's constitutionality hinged upon this extraordinary factual record. Indeed, this Court's decisions make clear that Section 5 was only justified as a response to the pervasive voting discrimination that had been perpetuated by covered jurisdictions' "extraordinary stratagem" of "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Miller*, 515 U.S. at 926; *see also Garrett*, 531 U.S. at 373; *City of Rome*, 446 U.S. at 174; *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 n.21 (1969).

II. IN REAUTHORIZING SECTION 5 WITHOUT ANY MEANINGFUL LIMITATIONS, CONGRESS ACTED OUTSIDE ITS ENFORCEMENT POWER.

In reauthorizing Section 5 in 2006, Congress was again required to compile evidence showing continuing unconstitutional behavior on the part of the States and to tailor its remedy to the particular covered evils. While Congress collected a large volume of evidence, it utterly failed to collect the *kind* of evidence that this Court has insisted upon in its enforcement clause cases *i.e.*, evidence of constitutional violations. Likewise, it made virtually no attempt to examine the bounds of its enforcement authority and to limit the scope of any legislation it did enact accordingly. Thus, it is plain that Section 5 cannot withstand constitutional scrutiny.

A. Congress Failed to Compile the Factual Record Necessary to Justify Enforcement Legislation.

Contrasting the facts on which the *Katzenbach* Court relied to find Section 5 constitutionally justifiable with the contemporaneous evidence on which Congress relied to justify reauthorizing Section 5 in 2006, it becomes plain that Congress failed to compile the evidentiary record required under this Court's enforcement clause precedents. Indeed, Congress' audacious finding that the present record is similar to the record of widespread invidious discrimination before the Court in *Katzenbach* diminishes not only the great progress achieved under the VRA but also the degree of discrimination suffered by African-Americans prior to the VRA's enactment.

1. The Violations on Which the *Katzenbach* Court Relied No Longer Exist.

As discussed above, Section 5 was enacted to remedy the specific problem of States resorting to obstructionist tactics and discriminatory devices in order to evade judgments intended to enforce the Fifteenth Amendment. The result of such practices was the gross disparity in voter registration and turnout between African-Americans and whites, *see, e.g.*, *Katzenbach*, 383 U.S. at 313 (highlighting the 50-percentage-point disparity in registration rates between African-Americans and whites), which the Court considered to be "reliable evidence of actual voting discrimination." *Id.* at 329. However, the "exceptional conditions" and "unique circumstances" that justified Section 5's enactment in 1965 have changed dramatically, and the evidence the *Katzenbach* Court found instructive in upholding Section 5 in 1966 is now virtually non-existent.

Certainly long gone are the days of "grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter," *id.* at 311 *i.e.*, the types of discriminatory "tests and devices" that the *Katzenbach* Court found were "relevant to voting discrimination because of their long history as a tool for perpetrating the evil," *id.* at 330.[7] Indeed, "these violations occurred at least decades ago." Richard L. Hasen, *Congressional*

7. *See also* H.R. Rep. No. 109-478, at 7 ("[T]he primary method of keeping minorities from participating in the election process was through the administration of State constitutional amendments and statutorily-authorized tests and devices, such as literacy tests, moral character requirements, and interpretation tests.").

Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane, 66 Ohio St. L.J. 177, 189 (2005)

Moreover, there is a complete lack of evidence of the "unremitting and ingenious defiance of the Constitution," *Katzenbach*, 383 U.S. at 309, that previously motivated this Court to uphold the "uncommon exercise of congressional power" embodied in Section 5, *id.* at 334. Notwithstanding Congress' conclusory and unsupported contention that it "knows from history that case-by-case enforcement alone is not enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process," H.R. Rep. No. 109-478, at 57, there is in fact no reason to believe that in the absence of Section 5, localities will revert to the "extraordinary stratagem" of tweaking laws found to be unconstitutional to force time-consuming litigation and perpetuate voter discrimination. Indeed, Congress itself noted that the extraordinary stratagems undertaken by covered States prior to Section 5's initial enactment were but relics of the past. *See* H.R. Rep. No. 109-478, at 12 ("The record reveals that many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated.").

Nor does statistical evidence of African-American disenfranchisement exist as it did at the time of *Katzenbach*. In the absence of discriminatory "tests and devices," African-American voter registration and turnout rates have skyrocketed. For example, according to the *Katzenbach* Court, the voter registration rate for African-Americans in Alabama in 1964 was 19.4%; in

Louisiana, it was 31.8%; and in Mississippi, it was 6.4%. 383 U.S. at 313. By 2004, the rates for Alabama, Louisiana, and Mississippi had jumped to 71.8%, 66.9%, and 72.2%, respectively.[8] *See* Appendix (hereafter "Appx.") at 6a. While the *Katzenbach* Court noted that in 1964, the "registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration" in Alabama, Louisiana, and Mississippi, *Katzenbach*, 383 U.S. at 313, by 2004, the disparity between African-American and white voter registration had nearly vanished. *See* H.R. Rep. No. 109-478, at 12 ("The Committee finds that the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982. In some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters."); *see also* App. Br. at 52-53. Indeed, by 2004, that disparity had dropped to 2.7% in Alabama and 8.1% in Louisiana. *See* Appx. at 6a. And in Mississippi, where African-American voter registration had lagged behind white registration by 50 percentage points in 1965, African-American voter registration *actually exceeded white voter registration by 1.5%. Id.*

Overall, in the states entirely covered by Section 5, African-American voter registration and turnout percentages are higher than whites' in three instances and on par with whites' in the remaining states; African-

8. Indeed, because "enforcement" legislation must be continually revisited to determine its current need, *see Boerne*, 521 U.S. at 533, 2008 voter registration statistics from several covered states demonstrate that there is even less justification for Section 5 today than there was in 2006. *See* Appx. at 2a.

Americans in these states have higher registration and turnout numbers than *any* racial group outside covered jurisdictions. *See* Charles S. Bullock III & Ronald Keith Gaddie, *The Bullock-Gaddie Voting Rights Studies: An Analysis of Section 5 of the Voting Rights Act* at 3-11, American Enterprise Institute (2006) ("Bullock & Gaddie"), *Addendum: Impact of Using Non-Hispanic White Data* (June 6, 2006); *Reauthorization of the Temporary Provisions of the Voting Rights Act* at 35-36, U.S. Commission on Civil Rights (April 2006); Edward Blum & Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act* at 4-5, American Enterprise Institute (May 17, 2006) ("Blum & Campbell"). *See also* H.R. Rep. No. 109-478, at 12 ("[T]he disparities between African-American and white citizens who are registered to vote have narrowed considerably in six southern States covered by the temporary provisions (Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia) and in the 40 counties covered in the State of North Carolina."); S. Rep. No. 109-295, at 10-11 (2006) (noting that "presently in seven of the covered States, African-Americans are registered at a rate higher than the national average," that in two more, African-American registration is "identical to the national average," and that in "California, Georgia, Mississippi, North Carolina, and Texas, black registration and turnout in the 2004 election . . . was higher than that for whites"); Appx. at 11a.[9]

9. Early returns from the 2008 presidential election show that turnout rates have continued to increase. *See* Appx. at 3a, 11a.

Based on this record, the evidence on which the *Katzenbach* Court relied to support Section 5's constitutionality—statistical evidence of African-American disenfranchisement and the use of historically discriminatory "tests and devices"—simply did not exist in 2006. To the contrary, evidence was proffered that undermined the conclusion that pervasive voting discrimination continues. Accordingly, it is clear that "there is no crisis in minority voting rights in 2006 compared to what there was in 1965 when the act was passed or in subsequent years." Blum & Campbell at 2-3.

2. The Facts Upon Which Congress Relied to Renew Section 5 Are Constitutionally Insufficient.

Though there was no evidence justifying Section 5 as an anti-evasion provision, Congress determined that Section 5 was still necessary to accomplish other goals. But unlike the evidence relied upon in *Katzenbach* and other decisions upholding legislation enacted under the enforcement clauses, the evidence Congress relied on in 2006 utterly fails to show the pervasive pattern or practice of constitutional violations that is a necessary predicate to the enactment of such legislation.

a. Racially Polarized Voting

Congress cited "[t]he continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965" as a factor supporting reauthorization. Pub. L. No. 109-246 § 2(b)(3), 120 Stat. at 577. Congress has never explained, however, how racially polarized voting

is evidence of unconstitutional discrimination.[10] This is not surprising, given that this Court has explicitly found that racially polarized voting is *not* evidence of unconstitutional discrimination unless it is accompanied by evidence of discriminatory intent. *See Bolden*, 446 U.S. at 64 (citing *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953)). By the same token, Congress and the courts may not look to the supposed motivation of the individual voters who instituted a particular scheme to find the necessary discriminatory intent. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 195-96 (2003); *Bolden*, 446 U.S. at 94 (Stevens, J., concurring).

Nevertheless, the evidence shows that it is partisanship and incumbency status—not race—that plays the decisive role in the way that votes are cast on election day.[11] In most instances, the failure of African-

10. The district court relied upon Congress' finding that racially polarized voting is a precondition to vote-dilution techniques. *NAMUDNO*, 573 F. Supp. 2d at 263-64 (citing H.R. Rep. No. 109-478, at 34-35). While this may be evidence of a continued need for Section 2, which is a permanent provision of the VRA, it provides no evidence in support of the need for Section 5.

11. *See* Bullock & Gaddie, Texas Report at 12, 17; Alabama Report at 12-14; Georgia Report at 30-33; Louisiana Report at 23-27; Mississippi Report at 11-15; South Carolina Report at 27-31; and Virginia Report at 11-15. Indeed, the evidence shows that white voters are much more likely to vote for Democrats (African-American or white) than African-American voters are to vote for Republicans of any race. *See, e.g.*, Mississippi Report at 11-15; South Carolina Report at 27; Virginia Report at 14-15. All reports available at http://www.aei.org/research/nri/subjectAreas/pageID.1140,projectID.22/default.asp.

American candidates to garner the majority support of white voters is mirrored by the failure of white Democrats to garner such support.[12]

b. Section 5 Enforcement

Congress relied upon "the hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and section 5 enforcement actions . . . in covered jurisdictions since 1982" as evidence of "discrimination." Pub. L. No. 109-246 § 2(b)(4)(A), 120 Stat. at 577. Similarly, Congress relied upon "the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia." Pub. L. No. 109-246 § 2(b)(4)(B), 120 Stat. at 577. There are several reasons that such evidence does not serve as an apt proxy for intentional discrimination.

Section 5's standard prohibits much more than the intentionally discriminatory conduct which creates a

12. Neither Congress nor the court below recognized the disconnect between decrying racially polarized voting while at the same time complaining of failures to draw majority-minority districts to insulate African-American and white voters from one another and presuming that a particular minority group has a single "candidate of choice" that is necessarily different from that of white voters. *See Bolden*, 446 U.S. at 88 (Stevens, J., concurring) ("[T]here is no more certainty that individual members of racial groups will vote alike than that members of other identifiable groups will do so. And surely there is no national interest in creating an incentive to define political groups by racial characteristics.").

constitutional violation. Indeed, between this Court's rulings in *Beer v. United States*, 425 U.S. 130 (1976), and *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Section 5 preclearance analysis included no inquiry whatsoever into discriminatory intent. *See* Michael J. Pitts, Georgia v. Ashcroft: *It's the End of Section 5 As We Know It (And I Feel Fine)*, 32 Pepp. L. Rev. 265, 273 (2005). Because the U.S. District Court for the District of Columbia evaluates preclearance requests under the same standards and does not, for example, require a showing of discriminatory intent, resort to statistics reflecting its actions has limited constitutional significance.[13]

Moreover, the Attorney General has regularly objected to changes based on interpretations of Section 5 that were eventually struck down by this Court as impermissible. *See* Richard L. Hasen, *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization* at 9, Testimony Before the Senate Committee on the Judiciary (May 9, 2006) ("The problem with using objections as evidence of intentional State discrimination is unfortunately even worse than it appears. In the 1990's DOJ adopted a policy of objecting to certain State actions that were perfectly constitutional, a policy the Supreme Court later rejected."). Yet, Congress relied on these to justify the reauthorization of Section 5. H.R. Rep. No. 109-478, at 21-24, 36-40.

13. Likewise, a jurisdiction's withdrawal of a submission after receiving a "more information" request letter from DOJ has no legal significance since Section 5's standard does not mirror the constitutional standard.

Even if one assumes that each and every one of the Attorney General's objections was based on unconstitutional conduct, the number of objections is itself miniscule and, perhaps more importantly, vanishing. Between 1982 and 2004, 0.71% of all submissions resulted in an objection. The evidence reveals that the objection rate is continuously declining. From 2003 to 2005, the annual objection rate declined from 0.17% to 0.06% to 0.03%. *See* Appx. at 4a-5a; Blum & Campbell at 11. Even the district court below noted "a steady drop in objection rates" culminating in a rate of 0.05% between 1998-2002. *NAMUDNO*, 573 F. Supp. 2d at 250. In no way can the fact that the Attorney General has *objected* to approximately 5 of every 10,000 proposed voting changes be considered evidence of pervasive discrimination sufficient to invoke Section 5's extraordinary remedy.[14]

Finally, Congress touted the fact that Section 5 objections, more information request letters, and enforcement actions prevented such evils as "annexation, at-large voting" and "multi-member districts." While this could be good evidence supporting the need for enforcement legislation if it was shown that a good number of the changes prevented would have

14. Any showing that jurisdictions have not complied with Section 5's preclearance requirements before instituting changes proves just that; neither Congress nor the district court below showed that any instance of non-compliance was motivated by an intent to deny any protected person or group their right to register or vote. *See NAMUDNO*, 573 F. Supp. 2d at 256-58 (citing H.R. Rep. No. 109-478, at 42).

been unconstitutional,[15] *see Boerne*, 521 U.S. at 532, these are all constitutional ways of conducting local government unless, like any other device, they are adopted with discriminatory intent. *See Bolden*, 446 U.S. at 66-67, 74. Where a state is under no constitutional duty to devise an "optimal" form of voting or government, the state's failure to do so cannot be evidence of unconstitutional behavior. *See Hibbs*, 538 U.S. at 751, 753 (Thomas, J., dissenting).

c. Section 2 and Section 4 Actions

Congress also relied on "the continued filing of section 2 cases that originated in covered jurisdictions" as evidence supporting the need for Section 5. Pub. L. No. 109-246 § 2(b)(4)(C), 120 Stat. at 578. Although decisions finding violations of Section 2 might serve as evidence of unconstitutional conduct since Section 2 is the VRA provision that most closely resembles the constitutional standard for discrimination, *see Katzenbach*, 383 U.S. at 329, the *filing* of a Section 2 suit does not demonstrate more than the plaintiff's contention that a Section 2 violation has occurred. Moreover, Section 5 cannot be justified on the existence of Section 2 litigation given that (1) more successful Section 2 actions have taken place in non-covered jurisdictions than in covered ones since 1982; (2) only approximately a dozen cases have found intentional

15. The district court below found persuasive testimony referencing DOJ objections based on "discriminatory intent." *NAMUDNO*, 573 F. Supp. 2d at 251-54. However, these objections were clearly based on findings of disparate impact, and there are few if any findings of actual intent to discriminate on the basis of race. *See* H.R. Rep. No. 109-478, at 12, 36.

discrimination or constitutional violations in covered jurisdictions since 1982 (thus averaging less than one per year); and (3) these figures include six instances of discrimination against white voters. *See* Blum & Campbell at 11; Edward Blum, *Section 5 of the Voting Rights Act: The Importance of Pre-Clearance*, Testimony Before the House Committee on the Judiciary, Subcommittee on the Constitution (Oct. 25, 2005); S. Rep. No. 109-295, at 13 & App. 1 (2006); *NAMUDNO*, 573 F. Supp. 2d at 258.

d. Federal Examiner and Observer Coverage

In addition, Congress attempted to justify Section 5 because of "counties certified by the Attorney General for Federal examiner and observer coverage and the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions." Pub. L. No. 109-246 § 2(b)(5), 120 Stat. at 578. But dispatching observers is not the result of actual, state-sponsored discrimination in conducting voting.

Congress and the district court noted that examiners and observers may be dispatched "when there is a reasonable belief that minority citizens are at risk of being disenfranchised." H.R. Rep. No. 109-478, at 44; *NAMUDNO*, 573 F. Supp. 2d at 262. This flimsy evidence[16] cannot possibly support Section 5. It is too

16. The district court relied, at least in part, on anecdotal evidence, which included an incident about a man complaining about being harassed for insisting on casting a vote when he was not even registered to vote. *See NAMUDNO*, 573 F. Supp. 2d at 262.

great a leap to infer the existence of pervasive intentional discrimination from the prophylactic dispatch of federal examiners and observers. A belief of a risk of disenfranchisement is nothing like the record of widespread intentional discrimination before this Court in *Katzenbach*.

e. Minority Representation Below Minority Population

Though careful to note that minorities have made significant gains in winning elected office, Congress found persuasive the fact that an African-American had never been elected to statewide office in three of the six originally covered states. *See* H.R. Rep. No. 109-478, at 18, 33. Congress also found persuasive evidence showing that African Americans accounted for 21% of state legislators in six southern states where the African-American population averages 35%, and that the number of Latino and Asian-Americans elected to office "has failed to keep pace with [the] population growth of those two communities." *Id.* at 33.

Apart from the fact that this factor assumes the existence of racially polarized voting, "[t]he Fifteenth Amendment does not entail the right to have [minority] candidates elected." *Bolden*, 446 U.S. at 65; *id.* at 86 (Stevens, J., concurring). Thus, in order to show a constitutional violation, "it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers." *Bolden*, 446 U.S. at 66. Indeed, "[t]he mere fact that [a group] has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional

remedies where . . . there is no indication that this segment of the population is being denied access to the political system." *Whitcomb v. Chavis*, 403 U.S. 124, 154-55 (1971). And given that, in comparison with the white majority, minority voters are reasonably able to elect candidates of choice, the fact that minorities in some areas have not been elected to public office in proportion to their percentage of the population is no evidence of unconstitutional conduct.[17]

17. Other testimony focused on "hostility to minority political participation," as evidenced by the "unpacking" of majority-minority districts into "coalition" or "influence" districts at issue in *Georgia v. Ashcroft*, *see Protecting Minority Voters: The Voting Rights Act at Work* at 14-16, Report of the National Commission on the Voting Rights Act (2006), apparently ignoring this Court's explicit finding in *Ashcroft* that this practice could be and was intended to be—of legitimate benefit to racial minorities. *See Ashcroft*, 539 U.S. at 480. A different report cited photo ID requirements like those recently upheld in *Crawford v. Marion County*, 128 S. Ct. 1610 (2008), as an example of discrimination and hostility to minority political participation justifying Section 5. *The Case for Extending and Amending the Voting Rights Act* at 16-17, American Civil Liberties Union (March 2006). Some other examples of purported discrimination border on the comical. One group cited a refusal to accept "bundled" mail-in voter registration forms, a requirement that candidates for office have a high school diploma or its equivalent, and a prohibition of "for sale" signs in a predominantly white municipality as "examples of discrimination" that demonstrate Section 5's continued necessity. *Id.* at 18-20. Indeed, that group would contend that this lawsuit is itself evidence of racial animus. *See id.* at 20 (stating that lawsuits challenging the constitutionality of the Voting Rights Act are evidence of discrimination).

B. Congress Failed to Impose Meaningful Limitations on Section 5.

Even if Congress did compile sufficient evidence showing that some type of enforcement legislation is both necessary and appropriate, it wholly failed to justify the particular remedy it chose. *See Riley v. Kennedy*, 128 S. Ct. 1970, 1987 (2008) (Stevens, J., dissenting) ("[I]t may well be true that today the statute is maintaining strict federal controls that are not as necessary or appropriate as they once were."). This failure runs afoul of this Court's enforcement clause precedents.

First, Congress failed to appropriately limit Section 5 on a geographic basis. *See* App. Br. at 62-64. In contrast to covering the areas with the worst voting records, reauthorized Section 5 covers many of the States leading the country in minority voter registration and turnout and in numbers of minority elected officials. *See* App. at 6a, 11a. It also covers jurisdictions in which no voting discrimination has ever been found, such as Appellant, *see* App. Br. at 9-10. *Cf. Civil Rights Cases*, 109 U.S. at 14.

Second, Congress did not consider lesser alternatives, including whether Section 2 would provide sufficient protection of minority voting rights or whether the bailout formula should be modified. Section 2 is a self-executing provision of the VRA that is meant to deal with unconstitutional conduct, unlike the anti-evasion focus of Section 5. *See Bossier Parish II*, 528 U.S. at 335. Neither Congress nor the district court made any attempt to explain why Section 2 is not capable of accomplishing its intended purpose, especially given the

absence of evidence showing that the States might resort to the type of schemes that compelled the need for Section 5 in the first place. *See supra* Section II.A.1. Indeed, Congress' citation of the volume and success of Section 2 actions seems to belie any contention that it is not a sufficient remedy. *See Katzenbach*, 383 U.S. at 334-35.

In addition, Congress failed to tailor Section 5 by expanding the bailout provision to ensure that it would reach every political subdivision covered. The *Katzenbach* Court found the availability of bailout to be a meaningful limitation on Section 5's broad remedy, *see id.* at 331-32, but that Court could not have imagined that, 44 years after Section 5's original enactment, only 15 jurisdictions would have successfully terminated coverage. *See also* H.R. Rep. No. 109-478, at 10 (stating, upon renewing Section 5 in 1982, that Congress expected most jurisdictions to have bailed out of coverage by 2007). This is due, at least in part, to the fact that many jurisdictions subject to Section 5 encompass political subdivisions whose preclearance submissions they do not and cannot control. *See* App. Br. at 24-25. Under the district court's interpretation of the VRA's bailout provisions,[18] the bailout mechanism is illusory, and Section 5 is no longer appropriately tailored to the problem it was designed to remedy. In that event, the Court should find Section 5 unconstitutional as applied to any subdivision otherwise covered by Section 5 but not entitled to seek bailout.

18. As Appellants ably demonstrate, the text and purpose of the bailout provision yield an interpretation that extends the opportunity to seek bailout to all "political subdivisions" in covered states. *See* App. Br. at 15-23.

Third, and finally, Congress could have limited Section 5's reach by imposing a meaningful temporal limitation. *See* App. Br. at 61-62. The fact that previous enactments of Section 5 have been for five, seven, and twenty-five years does not necessarily mean that twenty-five years is appropriate today, but Congress apparently thought that rote recitation of these facts was sufficient. Indeed, Congress apparently plucked the current twenty-five-year extension out of thin air, explaining only that "40 years has not been a sufficient amount of time." Pub. L. No. 109-246 § 2(b)(7), 120 Stat. at 578. The House considered and rejected an amendment that would have limited the period to nine years, but rejected it so that the new Section 5 would cover two full censuses and concomitant redistricting periods *i.e.*, just enough time to compile evidence to be used to reauthorize Section 5 again. *See* 152 Cong. Rec. H5143-204, H5187 (daily ed. July 13, 2006).

* * *

If there is anything "exceptional" about the conditions existing at the time of reauthorization, it is the amount of progress made since 1964. Despite the erosion of the factual basis that initially served as the constitutional justification for Section 5, some have suggested that Section 5 must be preserved because of its iconic status. *See*, *e.g.*, Jeffrey Toobin, *Voter, Beware*, The New Yorker (Mar. 2, 2009) ("[I]n a case to be argued before the Court this spring, the current conservative majority has a chance to undo this signal achievement of American democracy."). But to retire Section 5 is not to diminish its importance. Indeed, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), perhaps the greatest landmark of our Nation's struggle towards equal rights under the law and one of the great legal landmarks of our entire history, *see* Bruce Ackerman,

The Living Constitution, 120 Harv. L. Rev. 1737, 1750, 1752 (2007), proves the point. Forty-five years after the Court's decision in *Brown*, the district court in which *Brown* began declared that the Topeka school district had achieved unitary status and ceased court supervision of that district. *See Brown v. Unified School District No. 501*, 56 F. Supp. 2d 1212 (D. Kan. 1999). While there may be work left to be done by the Voting Rights Act, that work must be accomplished through narrower means. Section 5 has accomplished its goal and thus is no longer sustainable under the Constitution.

CONCLUSION

For the reasons set forth herein, the judgment of the district court should be reversed.

Respectfully submitted,

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APPENDIX

Voter Registration Rates (1965 v. 1988)

	March 1965			November 1988		
	Black	White	Gap	Black	White	Gap
Alabama	19.3	69.2	49.9	68.4	75.0	6.6
Georgia	27.4	62.2	35.2	56.8	63.9	7.1
Louisiana	31.6	80.5	48.9	77.1	75.1	-2.0
Mississippi	6.7	69.9	63.2	74.2	80.5	6.3
North Carolina	46.8	96.8	50.0	58.2	65.6	7.4
South Carolina	37.3	75.7	38.4	56.7	61.8	5.1
Virginia	38.3	61.1	22.8	63.8	68.5	4.7

Source: H.R. Rep. No. 109-478 at 12, 109th Cong., 2d Sess. (2006).

APPENDIX B — VOTER REGISTRATION 2004-2008

New Voter Registrations 2004-2008

	Black % of New Registrants	Black % of Voting Age Population	Black % of All Registered Voters (2004)	Black % of All Registered Voters (2008)
North Carolina	34.2	21.1	20.2	21.5
Georgia	43.2	29.2	27.7	30.01
Florida	43.5	13.7	11.9	13.1
Louisiana	52.5	29.3	29.7	30.4

Source: Charles S. Bullock, III & Ronald K. Gaddie, *The Triumph of the Voting Rights Act* (forthcoming 2009).

Voter Turnout 2008

	% Black – All Registered Voters	% Black – Voter Turnout
Georgia	30.01	30.06
Louisiana	30.40	29.50

Source: Charles S. Bullock, III & Ronald K. Gaddie, *The Triumph of the Voting Rights Act* (forthcoming 2009).

APPENDIX D — DOJ OBJECTIONS

Administrative Review of Voting Changes, 1982-2005

All Submissions

Year	Number	Objections	Percent Objections
1982	2,848	66	2.32%
1983	3,203	52	1.62%
1984	3,975	49	1.23%
1985	3,847	37	0.96%
1986	4,807	41	0.85%
1987	4,478	29	0.65%
1988	5,155	39	0.76%
1989	3,920	30	0.77%
1990	4,809	37	0.77%
1991	4,592	75	1.63%
1992	5,307	77	1.45%
1993	4,421	69	1.56%
1994	4,661	61	1.31%
1995	3,999	19	0.48%

Year	Number	Objections	Percent Objections
1996	4,729	7	0.15%
1997	4,047	8	0.20%
1998	4,021	8	0.20%
1999	4,012	5	0.12%
2000	4,638	4	0.09%
2001	4,222	7	0.17%
2002	5,910	21	0.36%
2003	4,829	8	0.17%
2004	5,211	3	0.06%
2005	3,811	1	0.03%
TOTAL	**105,452**	**753**	**0.71%**

Source: Bradley J. Schlozman, "Administrative Review of Voting Changes," Testimony Before the Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, October 25, 2005. See also H.R. Rep. No. 109-478 at 22, 109th Cong., 2d Sess. (2006).

APPENDIX E BULLOCK & GADDIE 2006 REGISTRATION

Voter Registration by Race and Ethnicity

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004	2006
Alabama														
Black	62.2	57.7	71.4	75.4	68.4	65.3	71.8	66.3	69.2	74.3	72.0	67.6	72.9	71.8
White	73.3	70.2	77.2	74.3	75.0	74.9	79.3	73.3	75.8	74.1	74.5	73.7	73.8	73.0
Non-Hispanic White										74.5	74.9	74.2	74.9	74.5
Arkansas														
Black	62.6	63.3	71.2	62.5	68.0	50.8	62.4	56.0	65.8	51.8	60.0	62.0	63.7	57.5
White	67.4	65.3	70.8	63.5	67.9	62.6	67.8	61.0	64.5	65.9	59.5	62.9	67.1	65.0
Non-Hispanic White										66.3	60.5	64.4	69.4	68.4
Florida														
Black	58.2	50.3	57.3	61.3	57.7	53.3	54.7	47.2	64.6	50.4	52.7	47.9	52.6	50.3
White	64.1	60.8	64.1	59.9	64.3	59.5	64.5	57.6	67.8	61.1	62.5	60.7	64.7	58.1
Latino	33.7	25.3	33.2	35.5	37.7	32.3	35.0	22.7	36.7	35.8	37.1	39.1	38.2	32.2
Non-Hispanic White										67.0	69.2	66.6	71.8	66.3
Georgia														
Black	39.8	51.9	58.0	55.3	56.8	57.0	53.9	57.6	64.6	64.1	66.3	61.6	64.2	57.9
White	67.0	59.7	65.7	60.4	63.9	58.1	67.3	55.0	67.8	62.0	59.3	62.7	63.5	62.1
Non-Hispanic Whites										63.1	61.0	65.3	68.0	67.9
Louisiana														
Black	69.0	68.5	74.8	71.9	77.1	72.0	82.3	65.7	71.9	69.5	73.5	73.5	71.1	56.9
White	74.5	67.5	73.2	71.4	75.1	74.1	76.2	72.7	74.5	75.2	77.5	74.2	75.1	73.2
Non-Hispanic White										75.6	78.0	75.6	76.6	75.0
Mississippi														

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Black	72.2	75.8	85.6	75.9	74.2	71.4	78.5	69.9	67.4	71.3	73.7	67.9	76.1	72.2
White	85.2	76.9	81.4	77.3	80.5	70.8	80.2	74.6	75.0	75.2	72.2	70.7	72.3	69.2
Non-Hispanic White										75.8	72.6	72.1	73.6	70.7
N. Carolina														
Black	49.2	43.6	59.5	57.1	58.2	60.1	64.0	53.1	65.5	57.4	62.9	58.2	70.4	61.1
White	63.7	62.5	67.0	65.8	65.6	63.6	70.8	63.9	70.4	65.6	67.9	63.1	69.4	65.9
Non Hispanic White										66.9	71.5	66.2	73.2	71.1
S. Carolina														
Black	61.4	53.3	62.2	58.8	56.7	61.9	62.0	59.0	64.3	68.0	68.6	68.3	71.1	67.8
White	57.2	54.5	57.3	56.4	61.8	56.2	69.2	62.6	69.7	67.9	68.2	66.2	74.4	60.2
Non-Hispanic White										68.0	69.8	68.2	75.5	63.5
Tennessee														
Black	69.4	67.1	78.5	73.0	74.0	68.5	77.4	70.0	65.7	64.8	64.9	54.1	63.9	53.5
White	66.9	68.5	70.2	65.0	64.4	63.3	63.4	63.9	66.3	63.9	61.9	62.3	62.6	63.8
Non-Hispanic White										63.9	62.8	65.2	64.1	65.9
Texas														
Black	56.4	56.6	65.3	66.6	64.2	60.0	63.5	58.5	63.2	62.1	59.5	65.1	68.4	62.4
White	52.4	59.4	66.0	58.2	66.5	61.1	66.1	59.7	62.7	59.7	61.8	57.7	61.5	59.7
Latino	39.3	43.2	45.2	43.1	45.5	40.0	42.9	39.2	42.7	39.7	43.2	39.1	41.5	40.0
Latino Citizens										56.2	60.0	56.2	58.8	58.1
Non-Hispanic Black										64.4	69.4	66.2	NA	NA
Non-Hispanic White										69.4	71.8	70.2	73.6	71.5
Virginia														
Black	49.7	53.6	62.1	66.5	63.8	58.1	64.5	51.1	64.0	53.6	58.0	47.5	57.4	52.0
White	65.4	60.5	63.7	63.3	68.5	61.9	67.2	63.6	68.4	63.5	57.6	64.1	68.2	65.5
Non-Hispanic White										64.7	69.1	66.7	71.6	69.8

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Original Seven State Median													
Black	61.4	53.6	62.2	66.5	63.8	61.9	64.5	59.0	65.5	68.0	68.6	67.6	71.1	66.9
White	67.0	62.5	67.0	65.8	68.5	63.6	70.8	63.9	70.4	67.9	68.2	66.2	72.3	66.9
Non-South														
Black	60.6	61.7	67.2	63.1	65.9	58.4	63.0	58.3	62.0	58.5	61.7	57.0	63.3	53.6
White	69.3	66.7	70.5	66.2	68.5	64.4	70.9	65.6	68.1	63.9	65.9	63.0	68.5	64.2
Non-Hispanic White									72.2	68.2	70.3	67.8	74.3	69.7
Latino	35.5	33.9	39	33.2	32.4	30.4	32.9	29.1	33.8	31.9	32.7	30.6	33.4	32.1

Source: Charles S. Bullock, III & Ronald K. Gaddie, *The Triumph of the Voting Rights Act* (forthcoming 2009) (based on U.S. Census Bureau data)

Appendix E

Table B.2. Voter turnout data by race and ethnicity

<Insert rule>

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004	2006
<Insert rule>														
Alabama														
Black	48.9	41.2	54.8	55.2	52.4	45.7	58.1	53.5	54.3	51.6	57.2	43.3	63.9	47.8
White	59.2	52.0	62.8	52.5	58.4	52.7	65.9	64.3	56.3	51.6	60.8	50.7	62.2	49.6
Non-Hispanic White										51.9	61.1	51.3	63.1	50.5
Arkansas														
Black	50.8	47.7	56.9	43.3	49.6	34.5	46.4	34.5	50.6	31.1	52.2	44.0	49.4	34.0
White	58.6	54.3	61.5	47.9	57.3	48.2	60.7	43.1	52.1	45.0	49.0	46.1	58.6	46.2
Non-Hispanic White										45.4	50.5	47.3	60.8	48.7
Florida														
Black	50.3	39.4	43.2	42.4	40.8	37.4	46.3	30.0	40.5	33.4	42.3	33.0	44.5	33.5
White	56.5	43.1	55.5	47.5	57.1	44.9	57.9	46.2	52.7	40.6	53.8	44.8	58.4	39.7
Latino	29.3	18.6	29.1	28.0	34.1	22.8	30.5	20.1	29.0	22.9	31.4	27.4	34.0	18.0
Non-Hispanic White										41.8	59.8	49.5	64.0	46.7
Georgia														
Black	43.7	32.5	45.9	37.3	42.4	42.3	47.1	30.9	45.6	40.2	51.6	38.5	54.4	38.6
White	56.0	40.7	55.3	40.5	53.2	42.6	58.7	38.3	52.3	36.8	48.3	41.4	53.6	42.2
Non-Hispanic White										37.6	49.6	43.0	57.4	46.2
Louisiana														
Black	60.1	32.0	66.4	55.8	61.5	55.9	71.5	30.9	60.9	46.0	63.2	46.9	62.1	36.1
White	65.6	23.6	64.7	57.5	67.5	59.2	68.3	35.6	62.6	35.7	66.4	51.0	64.0	40.9
Non-Hispanic White										36.2	67.3	52.1	65.2	41.6
Mississippi														
Black	59.5	50.8	69.6	40.2	60.3	32.5	61.9	41.7	48.8	40.4	58.5	40.2	66.8	50.5
White	70.9	52.4	69.2	45.8	64.2	35.8	69.4	45.2	59.3	40.7	61.2	43.6	58.9	38.8
Non-Hispanic White										41.1	61.9	44.6	60.0	39.7
N.Carolina														
Black	38.8	30.4	47.2	39.1	46.6	48.1	54.1	28.3	48.7	38.2	47.6	42.2	63.1	31.8
White	55.9	41.7	59.1	47.1	55.2	49.9	62.4	38.4	56.4	40.5	55.9	43.5	58.1	40.0
Non-Hispanic White										41.5	58.9	45.7	61.5	43.4

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S.Carolina														
Black	51.3	38.9	51.4	42.0	40.7	44.6	48.8	38.7	49.9	42.8	60.7	48.7	59.5	48.9
White	51.7	37.0	47.9	41.3	52.3	42.0	61.6	49.4	56.2	48.8	58.7	45.1	63.4	41.2
Non-Hispanic White										49.3	60.0	46.4	64.3	43.5
Tennessee														
Black	56.9	50.8	64.7	46.0	57.9	35.3	62.9	38.5	56.0	39.0	52.6	39.8	51.3	38.5
White	56.7	46.6	56.7	43.8	50.7	29.7	54.8	44.5	52.8	35.8	52.3	45.8	53.5	45.6
Non-Hispanic White										36.0	53.3	48.0	54.8	47.2
Texas														
Black	40.7	37.8	51.2	39.8	47.0	38.7	50.1	33.1	47.1	35.5	57.5	44.3	55.8	35.3
White	52.7	40.6	55.5	37.5	55.2	42.5	57.2	39.4	46.7	33.5	48.1	35.0	50.6	34.3
Latino	29.7	26.8	32.7	23.6	33.2	22.5	33.1	18.9	27.9	15.3	29.5	19.1	29.3	17.5
Latino Citizens										21.8	41.0	27.4	41.6	25.4
Non-Hispanic Black										36.7	57.8	45.1	NA	NA
Non-Hispanic White										42.4	57.9	45.7	63.4	44.4
Virginia														
Black	42.9	44.3	55.0	42.5	47.7	32.0	59.0	33.8	53.3	23.8	52.7	27.2	49.6	34.6
White	58.3	46.2	57.8	36.8	61.1	39.6	63.4	50.4	58.5	32.4	60.4	37.8	63.0	47.7
Non-Hispanic White										33.3	61.8	39.6	66.2	51.0
Original Seven States														
Black	48.9	38.9	54.8	42.0	47.7	44.6	58.1	33.8	49.9	40.4	57.2	42.2	62.1	38.6
White	58.3	41.7	59.1	45.8	58.4	42.6	63.4	46.2	56.4	40.5	60.4	44.8	62.2	41.2
Non-South														
Black	52.8	48.5	58.9	44.2	55.6	38.4	53.8	40.2	51.4	40.4	53.1	39.3	56.7	38.0
White	62.4	53.1	63.0	48.7	60.4	48.2	64.9	49.3	57.4	45.4	57.5	44.7	61.8	48.0
Non-Hispanic Whites										48.6	61.6	48.6	67.3	52.5
Latino	29.8	25.8	32.8	23.8	26.5	20.5	47.4	20.8	26.3	21.4	26.8	18.2	28.2	21.3
Nationwide														
Latino Citizens										32.8	45.1	30.4	47.2	32.3

<insert rule>

Source: U.S. Census Bureau data

APPENDIX F BULLOCK & GADDIE 2006 TURNOUT

Voter Turnout by Race and Ethnicity

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004	2006
Alabama														
Black	48.9	41.2	54.8	55.2	52.4	45.7	58.1	53.5	54.3	51.6	57.2	43.3	63.9	47.8
White	59.2	52.0	62.8	52.5	58.4	52.7	65.9	64.3	56.3	51.6	60.8	50.7	62.2	49.6
Non-Hispanic White										51.9	61.1	51.3	63.1	50.5
Arkansas														
Black	50.8	47.7	56.9	43.3	49.6	34.5	46.4	34.5	50.6	31.1	52.2	44.0	49.4	34.0
White	58.6	54.3	61.5	47.9	57.3	48.2	60.7	43.1	52.1	45.0	49.0	46.1	58.6	46.2
Non-Hispanic White										45.4	50.5	47.3	60.8	48.7
Florida														
Black	50.3	30.4	43.2	42.4	40.8	37.4	46.3	30.0	40.5	33.4	42.3	33.0	44.5	33.5
White	56.5	43.1	55.5	47.5	57.1	44.9	57.9	46.2	52.7	40.6	53.8	44.8	58.4	39.7
Latino	29.3	18.6	29.1	28.0	34.1	22.8	30.5	20.1	29.0	22.9	31.4	27.4	34.0	18.0
Non-Hispanic White										44.8	59.8	49.5	64.0	46.7
Georgia														
Black	43.7	32.5	45.9	37.3	42.4	42.3	47.1	30.9	45.6	40.2	51.6	38.5	54.4	38.6
White	56.0	40.7	55.3	40.5	53.2	42.6	58.7	38.3	52.3	36.8	48.3	41.4	53.6	42.2
Non-Hispanic White										37.6	49.6	43.0	57.4	46.2
Louisiana														
Black	60.1	32.0	66.4	55.8	61.5	55.9	71.5	30.9	60.9	46.0	63.2	46.9	62.1	36.1
White	65.6	23.6	64.7	57.5	67.5	50.2	68.3	35.6	62.6	35.7	66.4	51.0	64.0	40.9
Non-Hispanic White										36.2	67.3	52.1	65.2	41.6

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Mississippi														
Black	59.5	50.8	69.6	40.2	60.3	32.5	61.9	41.7	48.8	40.4	58.5	40.2	66.8	50.5
White	70.9	52.4	69.2	45.8	64.2	35.8	69.4	46.2	59.3	40.7	61.2	43.6	58.9	38.8
Non-Hispanic White										41.1	61.9	44.6	60.0	39.7
N.Carolina														
Black	38.8	30.4	47.2	39.1	46.6	48.1	54.1	28.3	48.7	38.2	47.6	42.2	63.1	31.8
White	55.9	41.7	59.1	47.1	55.2	49.9	62.4	38.4	56.4	40.5	55.9	43.5	58.1	40.0
Non-Hispanic White										41.5	58.9	45.7	61.5	43.4
S.Carolina														
Black	51.3	38.9	51.4	42.0	40.7	44.6	48.8	38.7	49.9	42.8	60.7	48.7	59.5	48.9
White	51.7	37.0	47.9	41.3	52.3	42.0	61.6	49.4	56.2	48.8	58.7	45.1	63.4	41.2
Non-Hispanic White										49.3	60.0	46.4	64.3	43.5
Tennessee														
Black	56.9	50.8	64.7	46.0	57.9	35.3	62.9	38.5	56.0	39.0	52.6	39.8	51.3	38.5
White	56.7	46.6	56.7	43.8	50.7	29.7	54.8	44.5	52.8	35.8	52.3	45.8	53.5	45.6
Non-Hispanic White										36.0	53.3	48.0	54.8	47.2
Texas														
Black	40.7	37.8	51.2	39.8	47.0	38.7	50.1	33.1	47.1	35.5	57.5	44.3	55.8	35.3
White	52.7	40.6	55.5	37.5	55.2	42.5	57.2	39.4	46.7	33.5	48.1	35.0	50.6	34.3
Latino	29.7	26.8	32.7	23.6	33.2	22.5	33.1	18.9	27.9	15.3	29.5	19.1	29.3	17.5
Latino Citizens										21.8	41.0	27.4	41.6	25.4
Non-Hispanic Black										36.7	57.8	45.1	NA	NA
Non-Hispanic White										42.4	57.9	45.7	63.4	44.4
Virginia														
Black	42.9	44.3	55.0	42.5	47.7	32.0	59.0	33.8	53.3	23.8	52.7	27.2	49.6	34.6
White	58.3	46.2	57.8	36.8	61.1	39.6	63.4	50.4	58.5	32.4	60.4	37.8	63.0	47.7

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Non-Hispanic White										33.3	61.8	39.6	66.2	51.0
Original Seven States														
Black	48.9	38.9	54.8	42.0	47.7	44.6	58.1	33.8	49.9	40.4	57.2	42.2	62.1	38.6
White	58.3	41.7	59.1	45.8	58.4	42.6	63.4	46.2	56.4	40.5	60.4	44.8	62.2	41.2
Non-South														
Black	52.8	48.5	58.9	44.2	55.6	38.4	53.8	40.2	51.4	40.4	53.1	39.3	56.7	38.0
White	62.4	53.1	63.0	48.7	60.4	48.2	64.9	49.3	57.4	45.4	57.5	44.7	61.8	48.0
Non-Hispanic Whites										48.6	61.6	48.6	67.3	52.5
Latino	29.8	25.8	32.8	23.8	26.8	20.5	27.4	20.8	26.3	21.4	26.8	18.2	28.2	21.3
Nationwide														
Latino Citizens										32.8	45.1	30.4	47.2	32.3

Source: Charles S. Bullock, III & Ronald K. Gaddie, *The Triumph of the Voting Rights Act* (forthcoming 2009) (based on U.S. Census Bureau data)

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 26 2009
OFFICE OF THE CLERK

No. 08-322

IN THE
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY
GENERAL OF THE UNITED STATES, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF DR. ABIGAIL THERNSTROM AND FORMER JUSTICE DEPARTMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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February 26, 2009

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STATEMENT OF INTEREST[1]

Dr. Abigail Thernstrom and former Justice Department officials submit this brief *amici curiae* in support of Appellant.

Dr. Abigail Thernstrom is an adjunct scholar at the American Enterprise Institute and Vice Chair of the U.S. Commission on Civil Rights. She is presenting her personal opinion as an election law expert and not the Commission's views.

Former Justice Department officials include Joel Ard, Karl S. Bowers, Jr., Robert N. Driscoll, William Bradford Reynolds, and Hans A. von Spakovsky. All have served in the Department's Civil Rights Division and have extensive experience with the Voting Rights Act and the Department's enforcement policies.

The *amici curiae* have a substantial interest in eliminating the use of race as a factor in redistricting.

[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk's Office or filed contemporaneously with this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

When Congress reauthorized the Voting Rights Act in 2006, it did not merely extend the life of §5 for twenty-five years; it substantially altered the substantive requirements of that provision in a way that deliberately increases the pressure on covered jurisdictions to engage in race-based redistricting. Because the amended §5 now contains an "implicit command that States engage in presumptively unconstitutional race-based districting," *Miller v. Johnson*, 515 U.S. 900, 927 (1995), it cannot properly be regarded as "appropriate" legislation to "enforce" the Fourteenth or Fifteenth Amendments under *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), or *Katzenbach v. Morgan*, 384 U.S. 641 (1966). The fundamental mistake of the court below was to assess a statute that plainly encourages States to use race in a way that at least potentially violates the Fourteenth Amendment right recognized in *Shaw v. Reno*, 509 U.S. 630 (1993), under the analysis employed in *Katzenbach* and *Morgan* for federal *prohibitions* against racially-tinged voting requirements. Moreover, *increasing* the substantive burdens on covered jurisdictions beyond those imposed on the South in the 1960s cannot rationally be viewed as a congruent and proportional effort to prevent discrimination.

Prior to the 2006 reauthorization, the Court took great care to interpret §5 in a way that would avoid the constitutional difficulties now created by Congress. In the face of persistent efforts by the Justice Department to find discriminatory purpose whenever a covered jurisdiction failed to *create*

additional race-based districts, even at the expense of traditional districting principles, the Court made clear that §5 applied only to the limited question of *retrogressive* purpose. *Reno v. Bossier Parish Sch. Bd.* (*Bossier II*), 528 U.S. 320, 329 (2000). Even though the Department's misinterpretation of §5's discriminatory "purpose" prong directly resulted in the racially-gerrymandered districts violative of *Shaw*, and even though the Court strongly warned that the Department's assessment of when majority-minority districts were required raised "serious constitutional concerns," *Miller*, 515 U.S. at 926, Congress in 2006 reauthorized the Department to require such districts under the "purpose" prong, thus ensuring that in the next redistricting cycle covered jurisdictions would again confront the conflicting demands of the Department and *Shaw*, in the manner that bedeviled redistricting in the 1990s.

Worse still, Congress significantly altered §5's substantive standard to prohibit any action with the "effect of *diminishing the ability* of [a minority group] . . . to *elect their preferred candidates of choice*," 42 U.S.C. § 1973c(b) (emphasis added), for the next three redistricting cycles, regardless of whether that diminution was necessitated by demographic changes or traditional districting principles. Congress created this guaranteed level of electoral success and representation for certain minority groups over the next three decades in order to overturn this Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Congress emphatically rejected *Ashcroft*'s conclusion that, forty years after §5 was enacted, some covered jurisdictions should be "permitted to break up

districts where minorities form a *clear* majority of voters and replace them with vague concepts such as . . . coalition [districts]." S. Rep. No. 109-295, at 19-20 (2006) (emphasis added). Accordingly, Congress preserved in amber until 2031 all extant majority-minority districts (or other "electable" minority districts), regardless of changes in voting patterns or demographics, thus ensuring that these segregative and constitutionally problematic districts were not simply temporary transformative measures, but will be a permanent part of the electoral landscape until at least 66 years after §5 was enacted. Needless to say, this extraordinary mandate to use race in voting requires a far more searching judicial inquiry than asking (as the district court did) whether it was rational for Congress to believe that some vestiges of voting discrimination persisted in 2006. In all events, the fact that §5 now *undermines* the nondiscrimination guarantees of the Fourteenth and Fifteenth Amendments clearly means that it is not congruent and proportional to enforcing those amendments.

ARGUMENT

I. THE COURT HAS PREVIOUSLY INTERPRETED §5 SO AS TO AVOID SERIOUS CONSTITUTIONAL CONCERNS

A. *Boerne* And *Katzenbach* Do Not Apply To Laws Authorizing Racial Classifications

The court below found that §5 of the Voting Rights Act is a constitutional exercise of Congress's power under the enforcement clauses of the Fourteenth and Fifteenth Amendments, pursuant to the analysis employed in *Katzenbach*, 383 U.S. at 301, and

Morgan, 384 U.S. at 641, and, alternatively, under this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997). This conclusion is wrong for all the reasons set forth by Appellant, but it is also plainly erroneous for a more fundamental reason. Namely, with respect to redistricting and similar vote-dilution claims, §5 is not a nondiscriminatory measure that prophylactically eliminates racial barriers to voting, like the laws at issue in *Morgan* and *Oregon v. Mitchell*, 400 U.S. 112 (1970), but, as substantially amended in 2006, is an affirmative requirement for States to create racial classifications of the sort that presumptively violate the Fourteenth Amendment under *Shaw*, 509 U.S. at 643-44.

That being so, the 2006 version of §5 is not properly regarded as "appropriate" legislation to "enforce" the Fourteenth or Fifteenth Amendments. As the Court explained in *Miller*, 515 U.S. at 927, if §5 contains an "implicit command that States engage in presumptively unconstitutional race-based districting," this "brings the Act, once upheld as a proper exercise of Congress' authority under §2 of the Fifteenth Amendment, *Katzenbach*, [383 U.S.] at 327, 337, into tension with the Fourteenth Amendment." Consequently, *Katzenbach*'s analysis would not support any such race-conscious version of §5 because, as the Court "recalled in *Katzenbach* itself, Congress' exercise of its Fifteenth Amendment authority . . . must 'consist with the letter and spirit of the constitution.'" *Id.* (quoting *Katzenbach*, 383 U.S. at 326).

Thus, a law that authorizes the creation of racial classifications is not assessed under the standards

established in *Katzenbach* or *Boerne* or, stated another way, is not deemed an appropriate exercise of Congress's enforcement power under the Reconstruction Amendments simply because it satisfies the tests set forth in those cases. Rather, racial classifications by States are permissible only if they are narrowly tailored to a compelling government interest, whether those classifications are enacted by States voluntarily or imposed on them by Congress. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995).

Indeed, from the outset, the Court has recognized that laws that threaten the race-neutral guarantees of the Equal Protection Clause and the Fifteenth Amendment are not a proper exercise of Congress's enforcement power and are not adjudged by the same standards applied to statutes eliminating State practices that disproportionately burden certain racial groups. Thus, in *Morgan*, the Court reiterated that legislation is "'appropriate'" under Section 5 of the Fourteenth Amendment only if it "is consistent with 'the letter and spirit of the constitution,'" 384 U.S. at 651 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)), and emphasized that the section "grants no power to restrict, abrogate, or dilute [the] guarantees" of that Amendment, *id.* at 651 n.10. It follows that "Congress has no power under the enforcement sections to undercut the Amendments' guarantees of personal equality and freedom from discrimination." *Mitchell*, 400 U.S. at 128 (opinion of Black, J.).

Thus, federal statutes that eliminate barriers to equal minority access, such as prohibitions against

"bonding" requirements in contracting that disproportionately burden minorities, *cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989), or a prohibition on literacy tests in voting, *see Morgan*, 384 U.S. at 658, are judged by a different, more lenient standard than laws that require States to establish contracting set-asides or that require race-based line drawing. The reasons for this differential treatment are self-evident.

Laws that impose burdens on States or infringe their autonomy, like the procedural aspects of §5 analyzed in *Katzenbach*, or that eliminate barriers to the ballot, such as the ban on the literacy test in *Morgan*, do not disadvantage or racially classify any citizen. Indeed, if anything, eliminating voting barriers benefits nonminorities by broadening the franchise. Thus, in situations where federal legislation overrides qualifications for voting because of their disparate racial impact, the only relevant constitutional interest is the State's interest in resisting congressional encroachment of its authority to establish voting qualifications. Since the validity of that encroachment turns on whether the federal statute prevents or remedies constitutional violations, that is the sum total of the inquiry.

In contrast, where federal statutes require or authorize States to establish racial classifications such as contracting "goals" or race-based redistricting schemes the relevant constitutional interest is the citizen's right to race-neutral treatment under the Equal Protection Clause, not just State autonomy. Consequently, the question is whether that personal right has been infringed, and that question turns on

whether the federal government has proved that the use of race is narrowly tailored to a compelling government interest. *Adarand*, 515 U.S. at 235. And, since "all governmental action based on race" is "a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited," all such action must be "subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Id.* at 227 (internal quotation marks omitted). Accordingly, when Congress uses such an "inherently suspect" classification, *Miller*, 515 U.S. at 904 (internal quotation marks omitted), it is subject to far more vigorous judicial scrutiny than that applied to determine whether Congress has exceeded a delegated power whether under the Necessary and Proper Clause or the enforcement clauses. Simply put, federal laws encouraging or requiring States to *use* racial classifications are subject to far more judicial skepticism and detailed scrutiny than federal laws *prohibiting* States from using devices with a racial impact or purpose.

Moreover, a federal law that presumptively *violates* the substantive commands of the Fourteenth or Fifteenth Amendments plainly cannot be legislation that "enforces," or is "appropriate" under, those Amendments, unless the government can rebut the presumption by satisfying the daunting requirements of strict scrutiny. Indeed, the Court has made clear that racial classifications imposed on States by Congress pursuant to Section 5 of the Fourteenth Amendment are just as suspect as voluntarily adopted State classifications, precisely

because it makes no sense to conclude that a "law that is an equal protection violation when enacted by a State" can somehow "become[] transformed to an equal protection guarantee when enacted by Congress." *Croson*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment). For this reason, the Court in *Adarand* took the extraordinary step of overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), in order to restore the "long-held notion" that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 225, 227. But even if the *Boerne* framework is used, §5 is not congruent and proportional, because it now *undermines* the nondiscrimination mandates of the Fourteenth and Fifteenth Amendments by encouraging segregated voting districts.

B. The Purposeful Creation Of Majority-Minority And "Electable" Minority Districts Requires Inherently Suspect Racial Classifications

In short, it is plainly improper to assess the validity of a federal law requiring a racial classification pursuant to the same standards used in *Morgan* or *Boerne* to analyze laws that lifted burdens on racial or religious groups. It seems quite obvious that a federal statute expressly mandating that States "create majority-minority districts even if this requires subordination of traditional districting principles" must be given far more searching analysis than a law that prohibits literacy tests as a prerequisite to voting. Yet the district court

proceeded as if *Morgan*'s endorsement of congressional power to eliminate barriers to voting through race-neutral means somehow resolves the separate question of whether Congress may require race-based redistricting under §5, even though, as detailed below, this Court has consistently warned that the Justice Department's interpretation of §5 raises serious constitutional questions under the Fourteenth Amendment and even though Congress altered §5 in 2006 to embrace the Department's expansive, race-conscious interpretation.

In fairness, there is potential for conceptual confusion in this regard, because the discriminatory "effect" prong of §5, when applied outside the redistricting or vote-dilution context, *is* simply a prophylactic prohibition against devices that exclude access to the ballot, and does not coerce racial favoritism or proportionality. Applying the "effect" prong to remove candidate filing fees or burdensome voting "qualifications" does not racially classify or disadvantage anyone, but simply eliminates headwinds that deny, albeit unintentionally, equal access. While the burden is eliminated because of its disparate impact on a minority group, the remedy does not impose any burden on nonminority voters indeed, it advantages those nonminorities who were burdened by the requirement.

In contrast, when the "effect" analysis concerns the degree of a minority group's representation in the legislature *i.e.*, whether overall minority voting strength has been "diluted" then there is a clear potential for the discriminatory "effect" prohibition to require race-based line drawing and group

favoritism, rather than equal opportunity. A straightforward and inviolable prohibition against procedures that result in a disparate effect in a certain body whether it is a workforce or school or legislaturc is, of course, simply a requirement for proportional representation. In a community with 30% minority representation, a prohibition against making selection decisions with a disproportionate effect is simply a requirement that the workforce or school select 30% of the racial group and is thus indistinguishable from numerical "goals" that thc Court has invalidated under the Equal Protection Clause. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 270, 284 (1986). In short, representation in a legislature, like that in a workforce or school, is a "zero-sum game" where a prohibition against representation falling below a certain percentage is a quota floor for the favored group and a quota ceiling for others.

Looked at another way, if the *remedy* for correcting the "effect" is to eliminate the barrier causing the effect, then government is not using race to classify or separate citizens. If the remedy is to use race to correct the effect, then government is utilizing this inherently suspect device. In redistricting, the remedy for failing to create majority-minority or "electable" minority districts is to create such race-conscious districts, just as school segregation is sometimes "corrected" (or avoided) through race-conscious school attendance lines and disproportionate representation in employment is corrected (or avoided) through "goals."

Section 5's principal and most important application is to redistricting plans, and the statute as amended prevents and remedies "dilutive" plans by mandating majority-minority or "electable" districts of the sort that have the potential to violate *Shaw*. This race-conscious mandate obviously cannot be judged by the same standards as race-neutral prohibitions of voting barriers, any more than a congressional statute mandating integrative "goals" of the sort invalidated in *Parents Involved* would be adjudged as if it merely foreclosed segregation. As *Morgan* itself noted, "an enactment authorizing the States to establish racially segregated systems of education would not be as required by § 5 a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws." 384 U.S. at 651 n.10. Because the Court has clarified repeatedly that the Equal Protection Clause also at least presumptively prohibits racial-balancing laws to "integrate" schools and redistricting plans that segregate voters to "benefit" minorities, *Morgan*'s exclusion of federal laws "authorizing" segregative, race-conscious line drawing from the ambit of Section 5 of the Fourteenth Amendment applies equally to these "benign" discrimination laws. After all, the whole point of strict scrutiny is to ensure that inherently suspect racial classifications truly do serve permissible ends in the most limited way which cannot be determined if such measures are merely subject to the limited, deferential *Morgan* inquiry. *See Adarand*, 515 U.S. at 236 ("[R]equiring strict scrutiny is the best way to ensure that courts will consistently give racial classifica-

tions . . . detailed examination, both as to ends and as to means.").

C. Limiting §5 To The Retrogression Context Reduces Race-Conscious Redistricting

Cognizant of the danger that an effects test may mandate impermissible racial preferences or segregation, the Court has been careful to interpret the "results" and "effect" requirements of, respectively, §2 and §5 in a manner that attempts to avoid any such mandate. With respect to §2, the Court has consistently made clear that the only "'right'" under that statute "'is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.'" *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 428 (2006) (plurality) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994)). Thus, while §2 will frequently command the elimination of notoriously dilutive devices such as at-large systems, it plainly does not require proportional representation, 42 U.S.C. § 1973(b); *see also De Grandy*, 512 U.S. at 1014 n.11; *Thornburg v. Gingles*, 478 U.S. 30, 96-97 (1986) (O'Connor, J., concurring), or maximization, *De Grandy*, 512 U.S. at 1016-17, or the creation of minority districts if they are not compact, *Gingles*, 478 U.S. at 49-50, or if they depart from other "'traditional districting principles such as maintaining communities of interest and traditional boundaries,'" *LULAC*, 548 U.S. at 433 (quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997)); *see also Miller*, 515 U.S. at 919, and otherwise requires a fact-bound focus on the "totality of circumstances,"

including the "tenuous[ness]" or strength of the "policy underlying the . . . practice," S. Rep. No. 97-417, at 29, 67 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207, 246.

In short, properly interpreted, §2 ensures only *equal* treatment of minority voters by requiring minority districts (if the totality of circumstances so dictates) only where it is fair to presume that other groups would be provided a district in analogous circumstances *i.e.*, when they constitute a majority of a district that is compact and consistent with traditional districting principles. *See Miller*, 515 U.S. at 920 ("'[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.'" (quoting *Shaw*, 509 U.S. at 646)). Conversely, since such naturally forming districts suggest only equal rather than preferential, treatment, a "legislature's compliance with 'traditional districting principles such as compactness, contiguity, and respect for political subdivisions' may well suffice to refute a claim of racial gerrymandering." *Id.* at 919 (quoting *Shaw*, 509 U.S. at 647).

Similarly, and more to the point here, this Court has consistently interpreted §5 to avoid the "serious constitutional concerns," *Miller*, 515 U.S. at 926, directly raised by the Justice Department's persistent efforts to expand the statute into an open-ended vehicle for it to mandate race-based redistricting.

First, the Court has consistently interpreted §5 to focus only on the "limited" and manageable question

of whether the redistricting plan is retrogressive. *Bossier II*, 528 U.S. at 335. Thus, the relative comparison is between only two plans the old plan and the new one. That is, there is only one "benchmark" for measuring minority voting strength the existing plan. *Holder v. Hall*, 512 U.S. 874, 883-84 (1994). If the inquiry had been expanded to whether the plan "dilutes" minority voting strength relative to proposed alternative *new* plans, this would both enormously complicate the submitting jurisdiction's justification burden and expand the Justice Department's power to second-guess the State's redistricting decisions under the discriminatory "purpose" prong.

Specifically, the question of whether a jurisdiction has rejected a proposed alternative for the purpose of "diluting" minority voting strength first requires analysis of the proposed alternative to determine whether it better enhances minority electoral chances. It is "often complex in practice to determine" the right answer to this question, *Ashcroft*, 539 U.S. at 480, because it requires, at the district level, a complicated and imprecise analysis of nonminority and minority voting patterns to estimate what minority percentage is sufficient to make the district "electable" for a minority-preferred candidate and then, with respect to the overall plan, to resolve issues like whether a plan with three districts where minorities have a 50% chance of winning is less "dilutive" than a plan with two "safe" minority districts. This imprecise inquiry is then followed by an even more speculative and amorphous analysis of whether the alternative was rejected "'because of,' not

merely 'in spite of,'" its "dilutive" effect. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). While assessing the "purpose" of a multi-member body is difficult and imprecise in all circumstances, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Rarely can it be said that a legislature . . . made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."), it is extraordinarily open-ended and amorphous in the redistricting context because partisanship and incumbency both substantially overlap with race.[2]

In short, if §5 had been expanded beyond the relatively straightforward retrogression analysis, the preclearance assessment would entail a fact-bound, complicated inquiry into §2-type dilution issues and a subjective, open-ended assessment of the submitting

[2] As this Court's cases and the closely divided results therein illustrate, it is quite difficult to disentangle whether a legislature's purpose is racial or political or incumbency protection. For example, it is difficult to determine whether line drawing that helps protect an incumbent by shedding hostile voters (*e.g.*, *LULAC*, 548 U.S. at 423-24) or adding friendly ones (*e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 252-53 (2001)) is racial or political; whether efforts to displace an incumbent from the opposite party are racial or political (*e.g.*, *LULAC*, 548 U.S. at 443-44); whether the creation of majority-minority districts is a dilutive effort to "pack" (*Ashcroft*, 539 U.S. at 481), an effort to maximize minority voting strength or an effort to advance Republican political interests in adjacent districts (*Voinovich v. Quilter*, 507 U.S. 146, 149-50, 153-154 (1993)); or whether diminution of minority percentages in majority-minority districts is an effort to dilute minority voting strength, to enhance it through increased "descriptive representation" (*Ashcroft*, 539 U.S. at 481), or to advance Democratic political interests (*id.* at 469-70).

jurisdiction's "purpose." And, as the Court has noted, this expanded standard would have raised serious constitutional concerns for two reasons.

First, "shift[ing] the focus of § 5 from nonretrogression to vote dilution, and . . . chang[ing] the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan [would] exacerbate the substantial federalism costs that the preclearance procedure already exacts." *Bossier II*, 528 U.S. at 336 (internal quotation marks omitted). The covered jurisdictions already bear the difficult burden of proving the *absence* of discriminatory purpose and effect. *Reno v. Bossier Parish Sch. Bd.* (*Bossier I*), 520 U.S. 471, 480 (1997); *see also Elkins v. United States*, 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative."). To subject these jurisdictions to the equivalent of a full-blown §2 trial *plus* the burden of showing that hypothetical plans were not rejected for any racial reason (particularly in a context where race often must be considered and correlates directly with politics and incumbency, *see Bush v. Vera*, 517 U.S. 952, 1060-62 (1996) (Souter, J., dissenting)) would substantially increase the onerous burdens of preclearance, "perhaps to the extent of raising concerns about § 5's constitutionality." *Bossier II*, 528 U.S. at 876.

Second, and more important, extending §5 to outlaw a discriminatory non-retrogressive purpose, would authorize the Justice Department,[3] without

[3] "Although [§5] permits a covered state to obtain preclearance, via a declaratory judgment, from the United States District Court for the District of Columbia, . . . given the long period of

any judicial review, *see Morris v. Gressette*, 432 U.S. 491, 502-05 (1977), to find discriminatory purpose whenever a covered jurisdiction has failed to create a race-based district, even where the district is plainly at odds with traditional districting principles. And the 1990s redistricting cases demonstrate that the Department's conception of §5 leads to "discriminatory purpose" findings even though the State rejected a majority-minority district because it was inconsistent with those principles, thus requiring the race-based districts violative of *Shaw*.

During the 1990 redistricting cycle, the Department routinely denied preclearance to redistricting plans on the ground that States had failed to prove an absence of discriminatory purpose by their failure to maximize the number of majority-minority districts. The Court has frequently noted this practice and strongly warned that the "Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting" raised "serious constitutional concerns" under both *Katzenbach* and the Fourteenth Amendment. *Miller*, 515 U.S. at 926-27.

In *Miller*, even though the Georgia legislature created one more majority-minority district than the prior plan, the Department still denied preclearance

(continued...)

time it typically takes for such litigation, that alternative is rarely practical in the typical redistricting situation in which elections must be held within months of the enactment of the redistricting plan." *Johnson v. Miller*, 929 F. Supp. 1529, 1532 n.5 (S.D. Ga. 1996).

based on the State's failure to create yet another majority-minority district. *Id.* at 906-07, 924. Significantly, the State had shown that drawing the second new district would have violated standards of "compactness," *id.* at 919, but the Department nevertheless found that this proffered nondiscriminatory purpose was insufficient. As this Court noted, "[i]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear the [Justice Department] was driven by its policy of maximizing majority-black districts." *Id.* at 924. The additional majority-minority district created to comply with the Department's demands, was a "[g]eographic[] . . . monstrosity," connecting "the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture." *Id.* at 917.

Similarly, North Carolina submitted a plan that created the State's first majority-minority district. *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 912 (1996). In its submission, the legislature proffered the following purposes behind its plan: "to keep precincts whole, to avoid dividing counties into more than two districts, and to give black voters a fair amount of influence." *Id.* But the Department denied preclearance on discriminatory purpose grounds, because the plan failed "to give effect to black and Native American voting strength in the south-central to southeastern part of the state." *Id.* at 902 (internal quotation marks omitted); *see also id.* at 912. As in Georgia, "the Justice Department was pursuing . . . the same policy of maximizing the number of majority-black

districts." *Id.* at 913. To satisfy the Department's demands, the legislature subsequently drew one majority-minority district that looked like a "'bug splattered on a windshield'" and a second district "wind[ing] in snakelike fashion" for 160 miles. *Shaw*, 509 U.S. at 635.

In Louisiana, the Department denied preclearance of the legislature's redistricting plan for state school board elections, claiming the legislature was acting with discriminatory purpose by not creating a new majority-minority district. *United States v. Hays*, 515 U.S. 737, 739-40 (1995). To prevent the Department from also rejecting its congressional redistricting plan, the legislature submitted a plan with a new majority-minority district that was "bizarre and irregular[ly] shape[d,] . . . cut[ting] across historical and cultural divides, split[ting] twelve of its fifteen parishes and divid[ing] four of the seven major cities of the State." *Hays v. Louisiana*, 862 F. Supp. 119, 121-22 (W.D. La. 1994). Similarly, the Texas legislature believed that the failure to draw a new majority-minority district "might be interpreted as retrogression under Section 5 of the Voting Rights Act." *Vera v. Richards*, 861 F. Supp. 1304, 1315 (S.D. Tex. 1994); *see also Vera*, 517 U.S. at 965-66.

Thus, it is clear that the Department interpreted §5 to authorize a finding of discriminatory purpose for the failure to create a majority-minority district, even where neutral districting principles supported the covered jurisdiction's decision. And, by effectively requiring such subordination of districting principles, it mandated the race-based line-drawing condemned

by *Shaw* and its progeny. Notably, after the 2000 *Bossier II* decision deprived the Department of its authority to find discriminatory purpose, the 2000 redistricting cycle did not produce a *single* instance where a court invalidated a redistricting scheme under *Shaw*. Yet, as we discuss more fully below, Congress in 2006, well aware of this reality, deliberately granted the Department the power to analyze non-retrogressive discriminatory purpose, and thus revived its well-established propensity to mandate race-based districts that violate traditional principles.

D. *Ashcroft* Interpreted §5's Retrogression Prohibition In A Way That Reduced Race-Conscious Redistricting

In addition to *Bossier II*, a second case, *Georgia v. Ashcroft*, 539 U.S. 461 (2003), confirmed that §5 did not mandate majority-minority districts, even in the retrogression context. In *Ashcroft*, the Court held that the proper retrogression inquiry should *not* "focus solely on the ability of a minority group to elect a candidate of choice." *Id.* at 485. Rather, the retrogression inquiry established under *Beer v. United States*, 425 U.S. 130 (1976), and its progeny whether a voting change "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *id.* at 141 is to be assessed under a "totality of circumstances" analysis akin to that used "in the § 2 context." *Ashcroft*, 539 U.S. at 480, 484-85. Just as the "'extent of the opportunities minority voters enjoy to participate in the political processes' is an important factor to consider in assessing a § 2

vote-dilution inquiry," the "same standard should apply to § 5." *Id.* at 485 (quoting *De Grandy*, 512 U.S. at 1011-12). Specifically, *Ashcroft* held that, "[i]n assessing the totality of the circumstances" for analyzing retrogression, *id.* at 480, the principal focus should be on three general factors: "the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." *Id.* at 479.

By interpreting the effective exercise of the electoral franchise to encompass more than the mere ability to elect candidates and, instead, to also include a broad-based inquiry into the totality of circumstances including "feasibility" and the opportunity to participate in all aspects of the political process the Court obviously reduced, in a number of ways, the pressure on §5 jurisdictions to mechanically maintain majority-minority districts.

First, in contrast to the "United States'" myopic focus on the "comparative ability of black voters in the *majority-minority* districts to elect a candidate of choice," *id.* at 485-86 (emphasis added), courts should examine whether there has been an increase in minority voters' ability to elect in "coalition districts" those "'in which minority citizens are able to form coalitions with voters from other racial and ethnic groups'" and thus have "no need to be a majority within a single district," *id.* at 481 (quoting *De Grandy*, 512 U.S. at 1020) to "offset[] any decrease in black voting age population" in the majority-minority districts, *id.* at 487. Consequently, this decision reduced the pressure under §5 to

segregate voters into majority-minority districts, which reinforce the "'demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens.'" *Miller*, 515 U.S. at 914 (citation omitted). Rather, the submitting jurisdiction has the option of creating integrated districts where minorities "'pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.'" *Ashcroft*, 539 U.S. at 481 (quoting *De Grandy*, 512 U.S. at 1020).

Second, and more important, the Court held that the minority group's ability to "influence the political process" in ways wholly apart from "winning elections" was a "highly relevant factor" in the retrogression analysis, *id.* at 482 (internal quotation marks omitted), which ameliorated the requirement to draw electable districts in a race-conscious manner, whether those electable districts were majority-minority or coalition. Rather than having to manipulate district lines to ensure "electable" districts, a covered jurisdiction could avoid retrogression (in part) through integrated districts where "'candidates,'" although "'elected without decisive minority support,'" would nevertheless "'be willing to take the minority's interests into account.'" *Id.* (quoting *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring in the judgment)). Thus, a State could choose to have "fewer minority representatives" without being deemed retrogressive if it had a correlative "increas[e] [in] the number of

representatives sympathetic to the interests of minority voters." *Id.* at 483. In addition, minorities' opportunity to participate politically, and the consequent "lack of retrogressive effect," could be established by showing that the districting plan maintains "legislative positions of power for minority voters' representatives" or that these representatives "support the new districting plan." *Id.* at 484.

Third, and perhaps most important as a practical matter, *Ashcroft* further reduced the pressure to engage in race-based redistricting by recognizing the relevance of traditional districting principles. Specifically, by clarifying that the *feasibility* of non-retrogressive plans was part of the retrogression analysis, the Court ensured that submitting jurisdictions were not required to subordinate those traditional principles to preserve majority-minority districts a course of action that would trigger strict scrutiny. *Miller*, 515 U.S. at 920. Thus, as is often the case in a highly mobile society, if demographic changes render it less than "feasible" to maintain majority-minority districts that are compact and respect political boundaries, jurisdictions need not subordinate such traditional districting principles to maintain those districts. This, again, avoids interpreting §5 in a way that requires a presumptive violation of the equal protection guarantee recognized in *Shaw*.

Thus, in the context of retrogression, the Court adopted an analysis of "effective exercise of the electoral franchise" that parallels the §2 inquiry. Section 2 plaintiffs must show that, "based on the totality of circumstances," they have "less

opportunity . . . to participate in the political process *and* to elect representatives of their choice," 42 U.S.C. § 1973(b) (emphasis added), and also show that the alternative benchmark plan that allegedly creates greater opportunities complies with traditional districting principles such as compactness and preservation of political boundaries and communities of interest. *See Chisom v. Roemer*, 501 U.S. 380, 397 (1991). The *Ashcroft* "totality of circumstances" analysis, which emphasizes the ability to politically participate and the plan's feasibility, in addition to ability to elect, establishes a strikingly similar inquiry when comparing the new redistricting plan to the old one.

In sum, the Court has taken great care to interpret both the "effect" and "purpose" prongs of §5 in a way that would avoid both exacerbating the federalism costs of preclearance and violating the equal protection principles of the Fourteenth Amendment.

II. AS AMENDED, §5 RESURRECTS THE SERIOUS CONSTITUTIONAL CONCERNS THAT THIS COURT SOUGHT REPEATEDLY TO AVOID

In 2006, Congress not only *extended* §5's restrictions, it made them substantially more onerous in a way that was plainly designed to increase the pressure to maintain and create majority-minority districts or similar race-based districts. Congress "overturned" this Court's decisions in *Ashcroft* and *Bossier II*, *see* H.R. Rep. No. 109-478, at 93-94 (2006), and adopted the Justice Department's expansive interpretation of §5 that had been rejected in those cases. In so doing, it ensured that minority voters'

current ability to elect their favored candidates would be preserved in amber until 2031, regardless of intervening demographic or other changes, and authorized the Department to use its "discriminatory purpose" power to again require race-based districting that subordinates traditional districting principles. Thus, in 2012, the Department will again be able to force Georgia to create a third majority-black congressional district that ignores standard districting principles and to short-circuit any effort by the State to build upon its successful effort to depart from majority-minority districts in a manner that does not impede minority voters' equal political opportunities. So increasing the pressure on covered jurisdictions to engage in race-based redistricting both (1) raises constitutional concerns sufficiently significant to render inapposite *Katzenbach*'s endorsement of race-neutral efforts to eliminate discriminatory devices and (2) standing alone, shows that the new §5 cannot be congruent or proportional.

Section 5 previously required denial of preclearance only if a change had the purpose or effect of "denying or abridging the right to vote." 42 U.S.C. § 1973c (2005). The new §5 works a fundamental shift by requiring denial of preclearance if a change in a covered jurisdiction's election law "has the purpose of or will have the effect of *diminishing the ability* of any [minority group] . . . to *elect* their preferred *candidates* of choice." 42 U.S.C. § 1973c(b) (emphases added). Thus, "the relevant analysis . . . is a comparison between the minority community's ability to elect their genuinely preferred candidate of choice before and after a voting change."

H.R. Rep. No. 109-478, at 71. This change transforms the law from one that promotes full voting access for all into a statute that blatantly mandates probable success for the preferred candidates of certain racial groups.

It is quite clear that the newly amended §5 standard is a forbidden "guarantee of electoral success for minority-preferred candidates," rather than an effort to ensure "equality of opportunity." *LULAC*, 548 U.S. at 428. Under the new §5, certain select minority groups have a federal right to a certain level of electoral power equivalent to that extant today for the next three redistricting cycles (through 2031). This quota floor on the level of minority electoral success is, of course, necessarily a quota ceiling on nonminorities' ability to elect.

The draconian nature of this blunderbuss requirement is exacerbated by the fact that there is literally no defense or justification, no matter how compelling, that would authorize a jurisdiction to allow diminution of minorities' electoral power. Even if demographic changes such as increased residential integration or migration of minorities from an urban core to the suburbs rendered a prior majority-minority district completely unfeasible absent wholesale abandonment of traditional districting principles, the State would nonetheless be required to create the district or its functional equivalent. The statute contains no escape clause for "feasibility," and Congress consciously eliminated *Ashcroft*'s "feasibility" inquiry. Surely Congress could not amend Title VII's effects test to eliminate the "business necessity" justification without running

afoul of the Fourteenth Amendment, much less persuade anyone that this naked effects test could be imposed on State employers pursuant to Section 5 of that Amendment.

Moreover, unlike §2, which requires only that political processes be "*equally* open" and forbids only providing minorities with "*less* opportunity" than other groups, 42 U.S.C. § 1973(b) (emphases added), nothing in the new §5's "ability-to-elect" requirement reflects any notion of racial *equality*. It is simply a straightforward command to never diminish minorities' ability to elect, regardless of their current success level and regardless whether race-conscious voting by nonminorities played any role in diminishing their electoral fortunes.

There can be little doubt that the new §5 locks in all existing majority-minority districts until 2031, even though those districts raise serious Fourteenth Amendment concerns and, at best, were viewed as a temporary device to facilitate the Nation's transformation to a race-blind electoral system. Since virtually every majority-minority district is so completely uncompetitive that general elections are a mere formality, *see* Franita Tolson, *Increasing the Quantity and the Quality of the African-American Vote: Lessons for 2008 and Beyond*, 10 Berkeley J. Afr.-Am. L. & Pol'y 313, 336, 339-41 (2008), it would be virtually impossible to transform such districts into coalition or similar districts where minorities have merely a "probable" or equal ability to elect their preferred candidates. Transforming an electoral "lock" into anything resembling a marginally competitive district will, by definition,

"diminish" the ability of minorities to elect their preferred candidates.

Accordingly, for the next twenty-five years, minority voters *will* be "immune from the obligation to pull, haul, and trade to find common political ground" because they will reside in districts where they completely control the electoral outcomes. *De Grandy*, 512 U.S. at 1020. While that result undoubtedly served the naked political interests of the Republicans who controlled Congress in 2006 (because of the opportunities for Republican candidates in the overwhelmingly nonminority districts adjacent to majority-minority districts) and of minority congressional incumbents who, like all politicians, prefer "safe" districts, it certainly disserves the broad public interest in achieving a "transformation to a society that is no longer fixated on race." *Ashcroft*, 539 U.S. at 490. Congress's extravagant condemnation of the Court's decision upholding a Georgia redistricting plan that was only the beginning of an effort to create, in Representative Lewis' words, a "truly interracial democracy," *id.*, can only be viewed as expressing antipathy towards any system not grounded on the "sordid business [of] divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

Indeed, in addition to effectively prohibiting the transformation of majority-minority districts into coalition or influence districts, the 2006 amendment further exacerbates racially preferential redistricting by also requiring the preservation of any such coalition districts. The plain language of the 2006

amendment does not limit its "ability-to-elect" requirement to majority-minority districts, and the legislative history confirms that the "no diminution" mandate applies to such districts. Congress made clear that a new redistricting plan must preserve a minority group's ability to elect its preferred candidates "either directly *or when coalesced with other voters*." H.R. Rep. No. 109-478, at 71 (emphasis added). Thus, while *Ashcroft* held that increases in coalition districts could be used to "*offset*[]" diminution in minority districts, 539 U.S. at 487 (emphasis added), the new §5 requires preservation of minority voting strength in *both* majority-minority and coalition districts.

Although there is no precise numerical definition of "coalition" or similar districts, the *Ashcroft* opinion, consistent with political science literature, noted that districts with a 30% black voting-age population are those in which "black voters as a group can play a substantial or decisive role in the electoral process." *Id.* at 487-88. It further noted that districts with only a 20% black voting-age population, but with an "overall percentage of Democratic votes of above 50%," are districts in which "black voters will constitute an effective voting bloc" where they can frequently, if not "always[,] elect the candidate of their choice." *Id.* at 489. Since such 20 to 30% districts provide minority voters with a likely, or certainly decent, ability to elect their preferred representative, and since there is no requirement in the new §5 that minorities "control" a district for the "no diminution" rule to apply, these districts must also be preserved.

As Justice Stevens correctly noted in *LULAC*, the 25.7% black citizen voting-age population district at issue there was, "at the very least," a "district where voters of color" could "'play a substantial, if not decisive, role in the electoral process'" and where blacks had consistently supported and elected a white Democrat. 548 U.S. at 479-80 & n.15 (Stevens, J., concurring in part and dissenting in part) (citation omitted). Accordingly, Justice Stevens concluded that this was a district where "blacks had the ability to elect candidates of their choice," and that Texas' failure to "offset[] this loss of a district with another district where black voters had a similar opportunity . . . was retrogressive" under §5. *Id.* at 479-80. Yet, as the *LULAC* plurality plainly stated, since there are such a large number of districts similar to the district at issue in *LULAC*, if the Voting Rights Act "were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Id.* at 446. Congress nevertheless amended §5 to require precisely the analysis set forth in Justice Stevens' opinion.

Indeed, the number of such coalition or "ability-to-elect" districts will continue to steadily increase as white bloc voting continues to significantly decline throughout the country. Thus, *more* districts will have to be preserved under the new §5. The 2006 amendment's ultimate perversity, then, is that the more success a jurisdiction has in achieving the bi-racial coalitions and color-blind voting that the Voting Rights Act was designed to bring about, the greater the number of districts that will be subject to

the "no diminution in the ability to elect" standard. A law that *increases* federal race-conscious mandates in *inverse* proportion to the race-consciousness of the electorate is not rational, much less congruent and proportional or narrowly tailored to a compelling government interest.

Finally, the legislative history eliminates any ambiguity about Congress's nakedly racial purpose. That history, which describes the *Ashcroft* decision in derisive terms normally reserved for opinions such as *Plessy v. Ferguson*, 163 U.S. 537 (1896), makes it absolutely clear that Congress's conscious goal was to convert §5's retrogression analysis from a nuanced "totality of circumstances" analysis designed to achieve equality with limited race consciousness, into a wholly mechanistic and inflexible requirement to preserve majority-minority and similar districts. According to Congress, the evil of the *Ashcroft* decision was that it, forty years after §5 was enacted, actually "permitted [covered jurisdictions] to break up districts where minorities form a *clear* majority of voters and replace them with vague concepts such as influence, coalition, and opportunity." S. Rep. No. 109-295, at 19-20 (emphasis added). So allowing States to "spread minority voters" out of majority-minority districts would, according to Congress, "turn[] Section 5 on its head," "effectively shut minority voters out of the political process," "allow States to turn black and other minority voters into second class voters," "threaten[] the Nation's commitment to representative democracy," and "make Federal scrutiny a wasteful formality." H.R.

Rep. No. 109-478, at 69-70 (internal quotation marks omitted).

If Congress was this outraged by the notion of Georgia being allowed to take some baby steps away from super-majority black districts, it is quite clear that no State will be permitted to break up these districts. Consequently, minority voters will be locked into such districts until at least 66 years after §5 was enacted. Indeed, since there was "sound reason to conclude" in *Ashcroft* that "race was a predominant factor in drawing the lines," which "would doom a redistricting plan under the Fourteenth Amendment," 539 U.S. at 491 (Kennedy, J., concurring), Congress's conclusion that this plan was not *sufficiently* racial and dedicated to super-majority districts vividly demonstrates that the 2006 amendment is, at a minimum, a sufficiently serious threat to the "letter and spirit" of the Fourteenth Amendment to foreclose any sort of *Katzenbach*-type deferential review. Although the "purpose of the Voting Rights Act is to prevent *discrimination* in the exercise of the electoral franchise," *id.* at 490 (majority opinion) (emphasis added), the new §5 prevents not discrimination but any diminution in majority-minority districts, regardless of whether that serves a remedial purpose.

Moreover, not content with making the retrogression inquiry synonymous with perpetual preservation of majority-minority districts, Congress also expanded §5 to, for the first time, authorize invalidation of *improvements* to minority voting strength, if the Justice Department determines that the improvements were not sufficiently far-reaching

to maximize minority voting strength. While prohibiting intentional racial discrimination is obviously valid under the enforcement clauses of the Reconstruction Amendments, the question here is whether injecting a free-floating purpose inquiry into §5, and authorizing that it be administered by a Department with a proven track record of using that power to require at least presumptively unconstitutional racial districting, can be considered a congruent and proportional effort to enforce those amendments.

As this Court has noted, congruency and proportionality must be assessed in light of other alternative enforcement mechanisms. *See Boerne*, 521 U.S. at 530; *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (noting, in a case holding that Title I of the ADA exceeded Congress's enforcement power, that other "federal recourse against discrimination" was available, such as actions by the United States for money damages or by private individuals for injunctive relief); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 733-34, 737 (2003) (upholding FMLA in part because "Congress had already tried unsuccessfully to address this problem"). Intentional racial discrimination in voting can be and is successfully challenged under either under §2 or through §1983 suits to enforce the Fourteenth or Fifteenth Amendments. Since §5 fills no substantive gap not covered by those statutes, Congress's decision to expand §5 beyond its traditionally limited, "no retrogression" mandate serves no purpose other than gratuitously burdening States and allowing the

Department to find "purpose" when the States fail to maximize majority-minority districts. Congress certainly provided no reason why expanding the Department's jurisdiction was in any way needed to ferret out racially discriminatory voting actions that would somehow otherwise escape detection and remedy.

In short, confronted with a situation where the Department had serially transformed a nondiscrimination requirement into a maximization command, Congress chose to reinvigorate this regime and the serious constitutional concerns it created. As Justice Kennedy has presciently observed, there "is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with [§5]." *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). Here, the Department is both permitted and authorized by Congress to ratify and encourage unconstitutional line-drawing, in circumstances where any real discrimination in voting by a State would be more than adequately addressed under the Constitution and §2.

That final point bears emphasis because, even assuming *arguendo* that the 2006 amendments are not in severe tension with the substantive provisions of the Fourteenth Amendment, the mere fact that Congress expanded, in 2006, §5's substantive burdens and race-conscious incentives cannot possibly be congruent and proportional. No rational person would argue that public or private voting discrimination today remotely resembles the

situation in 1965. Thus, *broadening* the scope of the statute beyond retrogression and *increasing* the race-conscious activity needed to satisfy the non-retrogression standard is, almost by definition, an "unwarranted response" to any lingering vestiges of voting discrimination. *Boerne*, 521 U.S. at 530 (citing *Katzenbach*, 383 U.S. at 334). Because the "appropriateness of remedial measures must be considered in light of the evil presented," *id.*, and the evil presented now is but a shadow of that rampant in the 1960s South, it is clear that Congress's ratcheting up of §5's race-conscious burdens at this late date is plainly not a congruent or proportional effort to eliminate race from voting, but rather a misguided effort to perpetuate the segregation of races into separate districts.

For all of these reasons, the Court should find that §5, at least as applied to redistricting, cannot be judged under the standards set forth in *Katzenbach* or *Morgan*, but must satisfy strict scrutiny or at least be subject to a most searching judicial evaluation of ends and means. For all the factual reasons set forth above by Appellant, the new §5 would emphatically flunk any such test.

Finally, we emphasize that receiving the Court's guidance now on §5's constitutionality in the redistricting context is extraordinarily important. Redistricting will begin in 2011 and it is almost certain that the Court will not have another opportunity before then to consider the constitutionality of §5's application in that context. But embarking on a redistricting cycle without this

basic guidance will be extremely problematic for a number of related reasons.

First, as in the 1990s, the constitutional validity of §5, and the Justice Department's enforcement of it, will not be assessed by this Court until well after districting is already completed in all States. If §5 is unconstitutional with respect to redistricting, it is better for all involved to know this before the Department exercises its unconstitutional power to establish voting schemes that will likely govern throughout the next decade. Mid-decade adjustments to unconstitutional schemes are obviously quite difficult to accomplish. Moreover, if the 2006 changes render §5 unconstitutional, then Congress should be informed as soon as possible, so it has an opportunity to attempt to pass a race-neutral, congruent-and-proportional extension.

Perhaps more important, a number of Justices have indicated that compliance with §5 somehow constitutes a compelling government interest that justifies what would otherwise be a *Shaw* violation. *See LULAC*, 548 U.S. at 475 n.12 (Stevens, J., concurring in part and dissenting in part); *id.* at 518 (Scalia, J., concurring in the judgment in part and dissenting in part). This obviously makes it all the more important to know whether §5 is itself constitutional. Compliance with a statute that is not authorized under (or that violates) the Fourteenth Amendment plainly cannot provide a compelling government interest to violate the Fourteenth Amendment.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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JOINT APPENDIX

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No. 08-322

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In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

JOINT APPENDIX

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U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #:
1:06-cv-01384-PLF-EGS-DST

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE
v. GONZALES

Panel:
Judge Paul L. Friedman
Judge Emmet G. Sullivan
David S. Tatel

Case in other court:
U.S. SUPREME COURT, 08-00322

Cause: 42:1973 Voting Rights Act

Date Filed: 08/04/2006
Date Terminated: 05/30/2008
Jury Demand: None
Nature of Suit: 441 Voting
Jurisdiction:
U.S. Government Defendant

08/04/2006	1	COMPLAINT against ALBERTO GONZALES (Filing fee $ 350) filed by NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE.(td,) (Entered: 08/07/2006)
11/09/2006	33	ORDER granting 9 Motion to Intervene, granting 10 Motion to Intervene, granting 13 Motion to Intervene, granting 22 Motion to Amend/Correct. Signed by Three Judge Panel (Judge David S. Tatel, Judge Paul L. Friedman and Judge Emmet G. Sullivan) on November

		9, 2006. (MA) (Entered: 11/09/2006)
11/15/2006	40	ORDER granting 28 Motion to Intervene, granting 19 Motion to Intervene, granting 23 Motion to Intervene. Signed by Three Judge Panel (Judge David S. Tatel, Judge Paul L. Friedman, and Judge Emmet G. Sullivan) on November 15, 2006. (MA) (Entered: 11/15/2006)
11/17/2006	46	ORDER granting 32 motion of Angie Garcia, et al. to intervene. Signed by Three Judge Panel (Judge David S. Tatel, Judge Paul L. Friedman, and Judge Emmet G. Sullivan) on November 17, 2006. (MA) (Entered: 11/17/2006)
03/22/2007	83	FIRST AMENDED COMPLAINT against ALBERTO GONZALES filed by NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE.(nmw,) (Entered: 03/23/2007)
03/23/2007	82	ANSWER to Complaint *First Amended Complaint* by TRAVIS COUNTY, TEXAS. Related document: 83 Amended Complaint filed by NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE.(Hicks, Max) Modified on 3/23/2007 (nmw,). (Entered: 03/23/2007)

03/26/2007	84	ORDER granting 70 Motion to Intervene. Signed by Three Judge Panel (Judge David S. Tatel, Judge Paul L. Friedman and Judge Emmet G. Sullivan) on 3/26/07.(lcplf2) Additional attachment(s) added on 3/26/2007 (lcplf2,). (Entered: 03/26/2007)
03/26/2007	85	ANSWER to Complaint by YVONNE GRAHAM, WENDY RICHARDSON, JAMAL RICHARDSON, MARISA RICHARDSON, WINTHROP GRAHAM. Related document: 1 Complaint filed by NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE.(jf,) (Entered: 03/27/2007)
04/05/2007	88	ANSWER to Amended Complaint by ALBERTO GONZALES. Related document: 83 Amended Complaint filed by NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE.(Herren, Thomas) (Entered: 04/05/2007)
04/09/2007	89	*Private Defendant-Intervenors'* ANSWER to Amended Complaint by NATHANIEL LESANE, GABRIEL DIAZ, JOVITA CASARES, ANGIE GARCIA, OFELIA ZAPATA, WINTHROP GRAHAM, YVONNE GRAHAM, WENDY RICHARDSON, JAMAL

RICHARDSON, MARISA RICHARDSON, WINTHROP GRAHAM, AUSTIN BRANCH OF THE NAACP, TEXAS STATE CONFERENCE OF NAACP BRANCHES, NICOLE LOUIS, RODNEY LOUIS, DAVID DIAZ, LISA DIAZ, PEOPLE FOR THE AMERICAN WAY. Related document: 83 Amended Complaint filed by NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE.(Zibel, Daniel) (Entered: 04/09/2007)

05/15/2007	96	MOTION for Summary Judgment by TRAVIS COUNTY, TEXAS (Attachments: # 1 Text of Proposed Order)(Hicks, Max) (Entered: 05/15/2007
05/15/2007	98	MOTION for Summary Judgment by ALBERTO GONZALES (Attachments: # 1 Exhibit Memoranda of Points & Authorities# 2 Statement of Facts # 3 Affidavit # 4 Text of Proposed Order # 5 Exhibit Notice of Filing Exhibits# 6 Exhibit Certificate of Service)(Herren, Thomas) (Entered: 05/15/2007)
05/15/2007	99	MOTION for Summary Judgment by NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit

2-Part A# 4 Exhibit 3# 5 Exhibit 4# 6 Exhibit 5# 7 Exhibit 6# 8 Exhibit 7# 9 Exhibit 8# 10 Exhibit 2-Part B# 11 Exhibit 2-Part c# 12 Exhibit 9# 13 Exhibit 10# 14 Exhibit 11# 15 Exhibit 12# 16 Exhibit 13# 17 Exhibit 14# 18 Exhibit 15# 19 Exhibit 16# 20 Exhibit 17# 21 Exhibit 18# 22 Exhibit 19# 23 Exhibit 20# 24 Exhibit 21# 25 Exhibit 22# 26 Exhibit 23# 27 Exhibit 24# 28 Exhibit 25# 29 Exhibit 26# 30 Exhibit 27# 31 Exhibit 28# 32 Exhibit 29# 33 Exhibit 30# 34 Exhibit 31# 35 Exhibit 32# 36 Exhibit 32-Part a# 37 Exhibit 33# 38 Exhibit 34# 39 Exhibit 35# 40 Exhibit 36 Part a# 41 Exhibit 36 part b# 42 Exhibit part c# 43 Exhibit 36 d# 44 Exhibit 36e# 45 Exhibit 37# 46 Text of Proposed Order # 47 Statement of Facts)(Ward, Christian) (Entered: 05/15/2007)

05/15/2007 100 MOTION for Summary Judgment by NATHANIEL LESANE, GABRIEL DIAZ, JOVITA CASARES, ANGIE GARCIA, OFELIA ZAPATA, WINTHROP GRAHAM, YVONNE GRAHAM, WENDY RICHARDSON, JAMAL RICHARDSON, MARISA RICHARDSON, WINTHROP GRAHAM, AUSTIN BRANCH OF

THE NAACP, TEXAS STATE CONFERENCE OF NAACP BRANCHES, NICOLE LOUIS, RODNEY LOUIS, ALBERTO GONZALES, DAVID DIAZ, LISA DIAZ, PEOPLE FOR THE AMERICAN WAY, TRAVIS COUNTY, TEXAS (Attachments: # 1 Text of Proposed Order Proposed order for Summary Judgment# 2, Affidavit Declaration of Paul R Q Wolfson# 3 Exhibit Declaration Exhibit 1# 4 Exhibit Declaration Exhibit 2A-2B# 5 Exhibit Declaration Exhibit 2C-2K# 6 Exhibit Declaration Exhibit 2L-2P# 7 Exhibit Declaration Exhibit 3-4# 8 Exhibit Declaration Exhibit 5# 9 Exhibit Declaration Exhibit 6# 10 Exhibit Declaration Exhibit 7# 11 Exhibit Declaration Exhibit 8# 12 Exhibit Declaration Exhibit 9# 13 Supplement Statement of Material Facts 01# 14 Supplement Statement of Material Facts 2# 15 Supplement Statement of Material Facts 03# 16 Supplement Statement of Material Facts 04# 17 Supplement Statement of Material Facts 05# 18 Supplement Statement of Material Facts 06# 19 Supplement Statement of Material Facts 07# 20 Supplement Statement of Material Facts 08# 21 Supplement Statement of Material

Facts 09# 22 Supplement Statement of Material Facts 10# 23 Supplement Memorandum of Law in Support)(Waldman, Ariel) (Entered: 05/15/2007)

05/16/2007 101 MOTION for Summary Judgment by GABRIEL DIAZ, DAVID DIAZ, LISA DIAZ (Attachments: # 1 Exhibit Memorandum in Support# 2 Exhibit Memorandum in Support Part 1# 3 Exhibit Memorandum in Support Part 2# 4 Exhibit Exh. 1 Part A# 5 Exhibit Exh. 1 Part B# 6 Exhibit Exh. 1 Part c# 7 Exhibit Exh. 2# 8 Exhibit Exh. 3# 9 Exhibit Exh. 4# 10 Exhibit Exh. 5 part a# 11 Exhibit Exh. 5 part b# 12 Exhibit Exh. 6 part a# 13 Exhibit Exh. 6 part b# 14 Exhibit Exh. 6 part c# 15 Exhibit Exh. 7 part a# 16 Exhibit Exh. 7 part b# 17 Exhibit Exh 7 part c# 18 Exhibit Exh. 7 part d# 19 Exhibit Exh. 8 part a# 20 Exhibit Exh. 8 part b# 21 Exhibit Exh. 8 part c# 22 Exhibit Exh. 8 part d# 23 Exhibit Exh. 8 part e# 24 Exhibit Exh. 9 part a# 25 Exhibit Exh. 9 part b# 26 Exhibit Exh. 10 part a# 27 Exhibit Exh. 10 part b# 28 Exhibit Exh. 11 part a# 29 Exhibit Exh. 11 part b# 30 Exhibit Exh. 12# 31 Exhibit Exh. 13# 32 Exhibit Exh. 14-15# 33 Exhibit Exh. 16-21# 34 Exhibit Exh. 22-24# 35

Exhibit Exh. 25# 36 Exhibit Exh. 26# 37 Text of Proposed Order Granting Motion for Summary Judgment# 38 Declaration in Support of Motion)(Perales, Nina) (Entered: 05/16/2007)

05/24/2007 104 AMICUS BRIEF by BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW. (lc,) (Entered: 05/25/2007)

06/15/2007 107 Memorandum in opposition to re 101 MOTION for Summary Judgment, 100 MOTION for Summary Judgment, 98 MOTION for Summary Judgment, 96 MOTION for Summary Judgment filed by NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE. (Attachments: # 1 Exhibit No. 1# 2 Exhibit No. 2# 3 Text of Proposed Order # 4 Statement of Facts Opposition)(Ward, Christian) (Entered: 06/15/2007)

06/15/2007 109 Memorandum in opposition to re 99 MOTION for Summary Judgment filed by ALBERTO GONZALES. (Herren, Thomas) (Entered: 06/15/2007)

06/15/2007 111 Memorandum in opposition to re 99 MOTION for Summary Judgment filed by NATHANIEL LESANE, GABRIEL DIAZ, JOVITA CASARES, ANGIE GARCIA,

OFELIA ZAPATA, WINTHROP GRAHAM, YVONNE GRAHAM, WENDY RICHARDSON, JAMAL RICHARDSON, MARISA RICHARDSON, WINTHROP GRAHAM, AUSTIN BRANCH OF THE NAACP, TEXAS STATE CONFERENCE OF NAACP BRANCHES, NICOLE LOUIS, RODNEY LOUIS, DAVID DIAZ, LISA DIAZ, PEOPLE FOR THE AMERICAN WAY, TRAVIS COUNTY, TEXAS. (Attachments: # 1 Clarke Declaration# 2 Clarke Declaration Exhibit 1-3# 3 Clarke Declaration Exhibit 4 Part 1# 4 Clarke Declaration Exhibit 4 Part 2# 5 Clarke Declaration Exhibit 4 Part 3# 6 Clarke Declaration Exhibit 5-6# 7 Wolfson Declaration# 8 Wolfson Declaration Exhibits)(Waldman, Ariel) Modified on 6/18/2007 (lc,). (Entered: 06/18/2007)

07/06/2007 112 REPLY to opposition to motion re 99 MOTION for Summary Judgment filed by NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE. (Ward, Christian) (Entered: 07/06/2007)

07/06/2007 113 REPLY to opposition to motion re 101 MOTION for Summary Judgment, 100 MOTION for Summary

		Judgment, 96 MOTION for Summary Judgment filed by NATHANIEL LESANE, GABRIEL DIAZ, JOVITA CASARES, ANGIE GARCIA, OFELIA ZAPATA, WINTHROP GRAHAM, YVONNE GRAHAM, WENDY RICHARDSON, JAMAL RICHARDSON, MARISA RICHARDSON, WINTHROP GRAHAM, AUSTIN BRANCH OF THE NAACP, TEXAS STATE CONFERENCE OF NAACP BRANCHES, NICOLE LOUIS, RODNEY LOUIS, DAVID DIAZ, LISA DIAZ, PEOPLE FOR THE AMERICAN WAY, TRAVIS COUNTY, TEXAS. (Zibel, Daniel) (Entered: 07/06/2007)
07/06/2007	114	REPLY to opposition to motion re 98 MOTION for Summary Judgment filed by ALBERTO GONZALES. (Herren, Thomas) (Entered: 07/06/2007)
09/17/2007		Minute Entry for proceedings held before U. S. District Judge Paul L. Friedman, U. S. District Judge Emmet G. Sullivan, U. S. Circuit Court Judge David S. Tatel: Three-Judge Motion Hearing held on 9/17/2007 re 101 MOTION for Summary Judgment filed by GABRIEL DIAZ, LISA DIAZ, DAVID DIAZ, 96 MOTION for Summary Judgment filed by

		TRAVIS COUNTY, TEXAS, 100 MOTION for Summary Judgment filed by ALBERTO GONZALES, WINTHROP GRAHAM, MARISA RICHARDSON, JOVITA CASARES, TRAVIS COUNTY, TEXAS, WINTHROP GRAHAM, YVONNE GRAHAM, WENDY RICHARDSON, DAVID DIAZ, NICOLE LOUIS, AUSTIN BRANCH OF THE NAACP, ANGIE GARCIA, JAMAL RICHARDSON, LISA DIAZ, NATHANIEL LESANE, GABRIEL DIAZ, RODNEY LOUIS, TEXAS STATE CONFERENCE OF NAACP BRANCHES, PEOPLE FOR THE AMERICAN WAY, OFELIA ZAPATA, 98 MOTION for Summary Judgment filed by ALBERTO GONZALES, 99 MOTION for Summary Judgment filed by NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE. Motions 96, 98, 99, 100, 101 heard and taken under advisement. (Court Reporter Linda Russo) (mm) (Entered: 09/17/2007)
05/30/2008	133	OPINION denying plaintiff's motion for summary judgment and granting defendant's and defendant-intervenors' motions for summary judgment. Signed by Three-Judge Court (Judge Paul L.

		Friedman, Judge Emmet G. Sullivan, and Judge David S. Tatel) on May 30, 2008. (lcplfl) (Opinion amended 9/4/08) (Entered: 05/30/2008)
05/30/2008	134	ORDER AND JUDGMENT denying plaintiff's motion for summary judgment and granting defendant's and defendant-intervenors' motions for summary judgment. Signed by Three-Judge Court (Judge Paul L. Friedman, Judge Emmet G. Sullivan, and Judge David S. Tatel) on May 30, 2008.(lcplfl) (Entered: 05/30/2008)
07/08/2008	140	NOTICE OF APPEAL to the Supreme Court as to 134 Order, by NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE. Fee Status: No Fee Paid. Parties have been notified. (jf) Modified on 7/15/2008 (jf,). Modified on 8/22/2008 (jf,). (Entered: 07/15/2008)
07/15/2008		Transmission of Notice of Appeal and Docket Sheet to US Supreme Court re 140 Notice of Appeal. (jf,) (Entered: 07/15/2008)
09/04/2008	142	AMENDED MEMORANDUM OPINION of Original Opinion filed 5/30/08 denying plaintiff's motion

		for summary judgment and granting defendant's and defendant-intervenors' motions for summary judgment. Signed by Three-Judge Court (Judge Paul L. Friedman, Judge Emmet G. Sullivan, and Judge David S. Tatel)(signed 9/3/08) (Entered: 09/04/2008)
09/11/2008	143	SECOND AMENDED MEMORANDUM OPINION of Original Opinion filed 5/30/08 denying plaintiff's motion for summary judgment and granting defendant's and defendant-intervenors' motions for summary judgment. Signed by Three-Judge Court (Judge Paul L. Friedman, Judge Emmet G. Sullivan, and Judge David S. Tatel)(signed 9/8/08)(jeb,) (Entered: 09/11/2008)
09/11/2008	144	Receipt dated 9/10/2008 from U.S. Supreme Court of record on appeal on 9/8/08 as Supreme Court No. 08-322. (mmh,) (Entered: 09/16/2008)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	)	
VS.	)	CIVIL ACTION NO.: 1:06-CV-01384 (PLF, DST, EGS)
ALBERTO GONZALES, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES	)	

****

ORAL DEPOSITION OF

WILLIAM C. FERGUSON

FEBRUARY 20, 2007

VOLUME 1

****

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	*	
Plaintiff	*	Civil Action No.
VS.	*	1:06-CV-01384
ALBERTO GONZALES, in his official capacity as Attorney General of the United States	*	(PLF, DST, EGS)
Defendant	*	

****

ORAL DEPOSITION OF

WILLIAM C. FERGUSON

FEBRUARY 20, 2007

VOLUME 1

****

[2] **ORAL DEPOSITION OF WILLIAM C. FERGUSON, VOLUME 1**, produced as a witness at the instance of the Defendant-Intervenors Texas State Conference of NAACP Branches and Austin Branch of the NAACP, and duly sworn, was taken in the above-styled and numbered cause on the 20th day of February, 2007, from 9:35 a.m. to 11:59 a.m., before MARSHA EVANS, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand, at the Embassy Suites Hotel, 300 South Congress Avenue, Austin, Texas, pursuant to the

Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

[3] **APPEARANCES**

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– and –

MR. PAUL R.W. WOLFSON
WILMERHALE
1875 Pennsylvania Avenue, NW
Washington, DC 20006
202-663-6390

ALSO PRESENT:

Markell Pool

* * *

[6] **INDEX**

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Plaintiff Northwest Austin Municipal Utility District No. 1's Answers to Private Defendant-Intervenor's Joint First Set of Interrogatories

3 ..... 23/1
Submission Under Section 5, Voting Rights Act

[7] 4 ..... 42/20
Election Agreement Between Travis County and Northwest Austin Municipal Utility District No. 1

5 ..... 59/23
Resident List

* * *

[67] Q. Prior to that you weren't aware that the district was subject to the preclearance requirement?

A. No, sir.

Q. Does Mr. Reilly currently handle the submissions that the district makes to the Department of Justice under the preclearance requirements?

A. As our attorney I assume that he either makes whatever appropriate contact or petitions that are required under law or his agent that he designates would do so.

Q. Are you familiar with Ms. Sharlene Collins?

A. I have met her, yes.

Q. Has – has she ever handled the submission of preclearance requests for the district?

A. I have no knowledge. Sharlene Collins was the attorney for the district when I was elected to the

board, and it was shortly after I was elected that we replaced her with Frank Reilly.

Q. And why was she replaced with Frank Reilly?

A. The board felt like it was going to be entering into some litigation against the city that might include some documents that she had been involved with, and so we wanted to eliminate any conflict of interest that might exist with her prior relationship with the developer.

[68] Q. Is there a reason that the district has a lawyer make the preclearance submissions to the Department of Justice as opposed to having a board member perform that duty?

A. Well, to the degree that we want to conform to the law we just – it seemed appropriate to have our attorney who would be familiar with the law take care of that responsibility for us. I can't say that any board member is familiar enough with that law in order to attempt to comply with it and do so appropriately. I don't think that – well.

Q. Let me turn your attention again if I could to the February 26, 2004 submission from Potts & Reilly. Has the – has the district, to your knowledge, submitted any preclearance requests to the Department of Justice since this 2004 request?

A. Not to my knowledge.

Q. And this 2004 submission was the only submission – the only preclearance submission that the district has filed since you became a board member in 2002, correct?

A. Yes, sir.

Q. And if you'll turn on page 2 of the document, Bates number P 009610, it lists seven prior submissions that the district has made to the Department of Justice [69] since the district's inception. You see that there?

A. Yes, sir.

Q. Are you aware of any other submissions that the district has made to the Department of Justice seeking preclearance other than these listed on page 2?

A. No, other than the one that we made in 2004, which, you know, isn't shown here.

Q. Which is, in fact, the document –

A. Right.

Q. Okay. Did the district seek preclearance of the agreement with Travis County to conduct the district's elections in 2006?

A. It was my understanding that you only have to – that you have to petition the Justice Department when a change is made and since no change was made in 2006 that we were in compliance with the

preclearance issue and that no petition had to be made.

Q. Has the district ever made a change affecting voting for which the district did not submit a preclearance request?

A. Not that I'm aware of and not since I've been on the board.

Q. Has the district ever considered any voting changes other than the ones reflected in the February 2004 submission?

[70] A. Right now we are pleased with the way Travis County is conducting the elections on our behalf.

Q. Since you've been a member of the board in 2002 there has been no situation which the district has considered a voting change but not pursued it; is that correct?

A. Other than the change that was made in the 2004 election, right. We've gone through two elections at the school, and we're currently pleased with the results.

Q. Has the district ever decided not to pursue a change in elections because it did not want to submit a preclearance request to the Department of Justice?

A. Would you repeat that?

Q. Has there ever been a situation when the district was considering making a change in voting

but decided not to because it did not want to submit a preclearance request to the Department of Justice?

A. Not that I'm aware of.

Q. Are you aware of any submissions that the district has made seeking preclearance which were denied by the Department of Justice?

A. No.

Q. Are you aware of any preclearance submissions that were submitted by the district in which the [71] Department of Justice sought additional information beyond what the district had submitted?

A. Not personally.

Q. Have you ever heard of that situation occurring?

A. I don't recall hearing it, no.

Q. Have you ever heard of any situations in which the district submitted a request for preclearance and the Department of Justice sought meetings or interviews with district officials?

A. I'm not aware of that circumstance.

Q. You indicated that the February 26, 2004 submission was the only preclearance submission that has been submitted since you became a board member in 2002?

A. Say that again, please. I want to make sure I got the dates correct.

Q. Sure. Since you became a board member in 2002 only one preclearance submission has been submitted by the district, and that is the –

A. That's my understanding.

Q. – February 2004 submission. Who prepared this submission?

A. Frank Reilly.

Q. On page 5 it's signed by Kerrie Jo Qualtrough. [72] Do you see that?

A. Yes, sir.

Q. Is she an attorney in Mr. Reilly's office?

A. That's my understanding, yes, sir.

Q. And this submission consists of this five-page letter to the Department of Justice with some attachments?

A. Yes, sir.

Q. Did you review the February 26, 2004 submission after Ms. Qualtrough prepared it?

A. Not that I recall, no, sir.

Q. Do you know if any of the members of the board of the district reviewed the submission after Ms. Qualtrough prepared it?

A. Don Zimmerman appears to have reviewed it.

Q. And why do you say that?

A. Okay. I'm sorry.

Q. Mister – Mr. Zimmerman signed the actual agreement with Travis County, correct?

A. That is correct. I'm sorry.

Q. Do you know if any members of the board actually reviewed the letter that Ms Qualtrough had –

A. No, sir, I do not know.

Q. Do you know how much you were – do you know how much the board was charged for – by the firm of

* * *

[93] **SIGNATURE**

I, WILLIAM C. FERGUSON, have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted on the previous page.

/s/ William C. Ferguson
WILLIAM C. FERGUSON

STATE OF Texas

COUNTY OF Travis

Before me, Sonja Hanna, on this day personally appears WILLIAM C. FERGUSON, known to me (or proved to me under oath or through TXDL 09022362 (description of identity card or other document) to

be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 16th day of March, 2007.

/s/ Sonja Hanna
NOTARY PUBLIC IN AND
FOR THE STATE OF Texas

[SEAL]	SONJA HANNA NOTARY PUBLIC, STATE OF TEXAS MY COMMISSION EXPIRES JUNE 21, 2008

[94] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	*	
Plaintiff	*	Civil Action No.
VS.	*	1:06-CV-01384
ALBERTO GONZALES, in his official capacity as Attorney General of the United States	*	(PLF, DST, EGS)
Defendant	*	

****

REPORTER'S CERTIFICATION
DEPOSITION OF WILLIAM C. FERGUSON
FEBRUARY 20, 2007

****

I, MARSHA EVANS, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, **WILLIAM C. FERGUSON**, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on MAR 07 2007 to the witness or to the attorney for the witness for examination, signature, and

return to ACUSCRIBE COURT REPORTERS by APR 09 2007 ;

That the amount of time used by each party at the deposition is as follows:

Mr. Benjamin Blustein – 2 hours, 2 minutes

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was [95] taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me on MAR 07 2007.

/s/ Marsha Evans
MARSHA EVANS, TEXAS CSR 5100
Expiration Date: 12/31/07
Firm Registration No. 241
114 West 7th Street, Suite 750
Austin, Texas 78701
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	)	
VS.	)	CIVIL ACTION NO.: 1:06-CV-01384 (PLF, DST, EGS)
ALBERTO GONZALES, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES	)	

****

ORAL DEPOSITION OF

DONALD S. ZIMMERMAN

FEBRUARY 21, 2007

VOLUME 1

****

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	*	
Plaintiff	*	Civil Action No.
VS.	*	1:06-CV-01384
ALBERTO GONZALES, in his official capacity as Attorney General of the United States	*	(PLF, DST, EGS)
Defendant	*	

****

ORAL DEPOSITION OF

DONALD S. ZIMMERMAN

FEBRUARY 21, 2007

****

[2] **ORAL DEPOSITION OF DONALD S. ZIMMERMAN**, produced as a witness at the instance of the Defendant-Intervenors Texas State Conference of NAACP Branches and Austin Branch of the NAACP, and duly sworn, was taken in the above-styled and numbered cause on the 21st day of February, 2007, from 8:39 a.m. to 1:02 p.m., before MARSHA EVANS, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand, at the Embassy Suites Hotel, 300 South Congress Avenue, Austin, Texas, pursuant to the Federal Rules of

Civil Procedure and the provisions stated on the record or attached hereto.

[3] **APPEARANCES**

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210-212-3700

ALSO PRESENT:

Markell Pool

* * *

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6	Notice of Deposition	10/22
7	Article from LegalTimes.com	168/8
8	Minutes, Board of Directors, Northwest Austin Municipal Utility District No. 1, May 23, 2006	37/25
[7] 9	First Amended Complaint	71/21
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* * *

[61] do.

Q. Could I ask you to look at exhibit – it was yesterday. Exhibit 3.

MR. COLEMAN: Do you have a clip or something for 8 so we can keep it all together?

MR. HICKS: Here's a rubber band.

MR. WOLFSON: Can I get one back? Oh, actually, you know what? I think I have one. No, this is not it. I'm sorry. Sorry. I want the preclearance submission for 2004. I have it. Never mind.

Q. (By Mr. Wolfson) Have you – have you seen this document before?

A. What am I looking at?

Q. Okay. This is a –

A. You said Exhibit 3?

Q. This is Exhibit 3, which should be – well, the covering should be a letter dated February 26, 2004 on the letterhead of Potts & Reilly. It's a submission to the Justice Department beginning at Bates number P 009609. If you look five pages in it's signed by Ms. Kerrie Jo Qualtrough, attorney for the district. And then there is an attachment to the document beginning at P 009614, which is a document called Agreement to Conduct Joint Elections between Travis County and Northwest Austin Municipal Utility District [62] Number One, and that has a number of pages. And on the very last page there's a signature block in Spanish.

MR. COLEMAN: I think that's an attachment to the agreement.

MR. WOLFSON: Right. Yes. There's a sample ballot which is attached to the agreement. That's right.

THE WITNESS: Yeah, I remember flipping – flipping through this. Uh-huh.

Q. (By Mr. Wolfson) Okay. When you – when you say you flipped through it, can you tell me –

A. Kind of like I'm doing right now.

MR. COLEMAN: When you say "this," are you talking about the agreement or the latter?

MR. WOLFSON: I'm talking about –

THE WITNESS: Well, I remember this submission because I remember seeing some things in here about Dana DeBeauvoir, the county clerk, you know, and it looked to me like the county would run the election, which is what we wanted. We wanted the MUD to be on the same ballot as everybody else, just lump it all together.

Q. (By Mr. Wolfson) Okay. So before Ms. Qualtrough sent this document to the Justice Department, did you review a draft or – beforehand?

[63] A. Right. And it looked something like this. It was probably the same thing.

Q. Did you give Ms. Qualtrough any comments on the draft?

A. No, other than, you know, I – as far as I could tell this was great, you know. I'd have to have more professional expertise. I'm not – I'm not an election lawyer. If I'm an election lawyer maybe I could say something, but it looked great to me.

Q. Could you give me an estimate of sort of how much time you spent flipping through this, as you said?

A. Probably ten minutes.

Q. Okay. What about other board members? Did they review this document?

A. Probably about the same.

Q. Okay.

A. We all went through it together.

Q. All right. Do you remember whether this was discussed at a board meeting, this document?

A. I don't have a clear recollection, but I know that we – again, I keep going back to the fact that we – we trusted our attorney to – to get this done for us.

Q. Okay.

A. And we did a cursory check, just like I said, [64] going through it quickly, and there was no reason for anybody to think that there was anything wrong with it. You know, we thought Frank had done a good job on it. Turns out he did.

Q. Now, this – this document includes the 2004 election agreement with Travis County, which begins at page 009614. If you want a chance to look at that, that's fine.

A. Okay.

Q. And on page 009624, which is page 11 of the agreement, there's what appears to be your signature. Is that – is that, in fact, your signature?

A. Yes.

Q. Okay. Thanks.

A. Absolutely.

Q. So did you review this agreement with Travis County before you signed it?

A. Did I review it with Travis County?

Q. Did the review the agreement with Travis County before you signed it?

A. Yeah. Again, I did a cursory check of it. I remember some of the language here, some of the names.

Q. Can you tell me –

A. I remember phoning Marilyn Wahl. She was a precinct chair and election judge, and we assigned her

* * *

[73] heard about preclearance, what would happen if we had a fire at the school or some catastrophe and the school became unsuitable for voting. I mean, a burden in that case is we would need to quickly move our voting location because the school is unusable for whatever reason. How do I know that we can get the paperwork back from, you know, the preclearance

people to make sure that happens? I see a burden there logistically.

Q. Let me – let me stop you there. Did you – did you ever ask anybody what processes were available at the Justice Department in the event of such a scenario?

A. Well, no, because I just see the whole thing as being wrong for the federal government to be, you know, meddling in our local elections like that.

Q. So is this – is this more of a – what I would call a philosophical disagreement with the policy of Section 5?

A. It's both. It's pragmatic and it's philosophical. My objection is on both grounds.

Q. You said there are delays. I mean, has there ever been a situation where the MUD could not, you know, carry out a schedule of election because of the preclearance process?

A. No, because we started in summer of 2002 to

* * *

[76] attorney what that was about, having the election at the school. I don't know what she was thinking.

Q. Could you look at – continuing on that paragraph moving over to the next page, I'd like you to look at the last sentence of that paragraph, local governmental units must weigh, et cetera.

A. Uh-huh.

Q. Has the MUD ever weighed the benefit of a proposed voting change against the burden of seeking the attorney general's approval?

A. We haven't in the past, but I think that certainly could be a problem in the future from the scenario I just told you about. If something happened to the regular polling place and we had to move it for purely pragmatic reasons and we have to go through the submission process, it could be a concern.

Q. And continuing on where the sentence says, "Virtually assuring that many political subdivisions from time to time forgo beneficial changes because of the bureaucratic burden," has the MUD ever forgone a beneficial change in voting procedures because of the bureaucratic burden?

A. Not in the past, no.

Q. Could you look at paragraph 20 of the amended complaint? That's on page 5. If you could read

* * *

[143] A. That's a personal reason for me. You know, that's a personal thing, but yeah.

Q. What percentage of the MUD board's business revolves around compliance with state law mandates, roughly? Obviously you can't come up with a perfect figure.

A. Say that again. I'm not –

Q. Sure. How much of the time that the board MUD – MUD board – I don't have the flu. I can't use that excuse. I apologize. How much of the time that the MUD board spends is involved in complying with state law mandates?

A. Maybe a third of the time.

Q. What would be your sense of how much is spent on compliance with federal law mandates?

A. Probably 5, maybe 5 percent of the time.

Q. And what percentage of that 5 percent would be involved in Section 5 compliance?

A. Maybe 1 or 2 percent.

Q. And what percentage would be other voting requirements?

A. Probably about the same percentage.

Q. Prior to the time at which you started raising the issues of preclearance, is it fair to say that Section 5 compliance was not a substantial aspect of [144] MUD board business?

A. That's – that's fair to say. We had other fires to put out.

Q. And –

A. Most of our effort legally was on the illegal taxation lawsuit.

Q. How does the – how has the MUD in the past identified voting changes that required submission for preclearance? How do you know when something triggers –

A. We consult our attorney, Frank Reilly, for instance. You know, we don't know.

Q. And is it the case that Frank Reilly attends all MUD board meetings?

A. Yes.

Q. And the compliance regime then is that he's at the meetings, the official meetings of board business, and if something rings that voting change bell you rely on Frank Reilly to say, "This presents an issue that we should consider"?

A. Correct. And there really aren't any changes. I mean, the lines are – the neighborhood is defined and the streets are kind of laid out, and everybody knows what's going to happen.

Q. So –

* * *

[182] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	*	
Plaintiff	*	Civil Action No.
VS.	*	1:06-CV-01384
ALBERTO GONZALES, in his official capacity as Attorney General of the United States	*	(PLF, DST, EGS)
Defendant	*	

****

REPORTER'S CERTIFICATION
DEPOSITION OF DONALD S. ZIMMERMAN
FEBRUARY 21, 2007

****

I, MARSHA EVANS, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, DONALD S. ZIMMERMAN, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on MAR 08 2007 to the witness or to the attorney for the witness for examination, signature, and

return to ACUSCRIBE COURT REPORTERS by APR 09 2007;

That the amount of time used by each party at the deposition is as follows:

Mr. Paul R.Q. Wolfson – 1 hour, 55 minutes
Mr. Max Renea Hicks – 12 minutes
Mr. Carlos Becerra – 5 minutes
Mr. Chris Herren – 21 minutes
Mr. George Korbel – 7 minutes
Mr. Debo P. Adegbile – 1 hour, 10 minutes.

[183] I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me on MAR 08 2007.

/s/ Marsha Evans
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[LOGO]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	)	
VS.	)	CIVIL ACTION NO.: 1:06-CV-01384 (PLF, DST, EGS)
ALBERTO GONZALES, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES	)	

****

ORAL DEPOSITION OF

SHARLENE N. COLLINS

FEBRUARY 22, 2007

VOLUME 1

****

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	*	
Plaintiff	*	Civil Action No.
VS.	*	1:06-CV-01384
ALBERTO GONZALES, in his official capacity as Attorney General of the United States	*	(PLF, DST, EGS)
Defendant	*	

****

ORAL DEPOSITION OF

SHARLENE N. COLLINS

FEBRUARY 22, 2007

VOLUME 1

****

[2] **ORAL DEPOSITION OF SHARLENE N. COLLINS, VOLUME 1**, produced as a witness at the instance of the Defendant-Intervenors Texas State Conference of NAACP Branches and Austin Branch of the NAACP, and duly sworn, was taken in the above-styled and numbered cause on the 22nd day of February, 2007, from 12:08 p.m. to 3:30 p.m., before MARSHA EVANS, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand, at the offices of Armbrust &

Brown, LLP, 100 Congress Avenue, Suite 1300, Austin, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

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* * *

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11	Submission Under Section 5, Voting Rights Act	44/18
12	Submission Under Section 5, Voting Rights Act	67/24
13	Letter from Joseph D. Rich to Sharlene N. Collins, Esq., dated May 24, 2002	68/14
14	Submission Under Section 5, Voting Rights Act	104/18
[7] 15	Submission Under Section 5, Voting Rights Act	106/20

* * *

[22] and there is one expert or another that explains to the board why that's on the agenda, what it's about, what you're asking them to do and why. There are elections that are held every two years, so there is work, you know, involved in calling the election, holding the election if it's contested, canvassing the voting rights submissions. There are taxes that are typically set every September, and with the help of the financial adviser those have to be posted for hearings, orders entered, working with the tax office to get that to them. Most of the actions taken by boards are, you know, maybe there is a resolution

that's done that we have to draft or an order adopting something. Those are the typical types of work that I would do. There are contracts that are entered into with various parties. We will negotiate the contracts on behalf of the district. That's sort of a thumbnail sketch of it.

Q. As far as you know during, say, the period 1986 through the end of 2001, to the extent the district had work other than bond counsel, legal work done, were you the person performing those legal services?

A. Yes. I don't recall that there were any occasions of litigation when we had any kind of outside counsel, but I can't tell you for certain.

[23] Q. Within your range of general counsel work I heard you say board meetings, agendas, election work, tax work, contract work, and each of those having some subcategories. Within that range of work that you did, what – if you had to approximate a guess as to what percentage of it related to elections, what would you say?

A. 5 percent.

Q. And when you were describing the elections work you did, you mentioned there is holding, calling, and Voting Rights Act submissions work. Were there any other categories of election-related work that you performed?

A. That's basically it.

Q. Did you also do work with respect to canvassing?

A. Well, the elections are canvassed by the board of directors. There is an order canvassing that we prepared and board's required to meet so many days after the election. That's changed recently. But at that time I think it was between three and eight days after the election, so there would be a board meeting set and held. The results of the election would be reviewed by the board, and then they would enter the order canvassing which would basically say what the [24] propositions or if it were directors being elected who won.

Q. Elections I think you said were about – election-related legal work was about 5 percent of your time for the district. If you had to sort of break it down, of that category of election work do you have a sense about how much consisted of Voting Rights Act submissions?

A. On this particular district, no.

Q. Did you play a general counsel role for other municipal utility districts in the range of time you were doing – giving general counsel services for the MUD in – here I guess we are talking about roughly 1986 through middle of 2002?

A. Yes.

Q. Typically for those districts would you say the percentage is broke down similarly such that

elections work was about 5 percent or in that range of your total work?

A. That would be typical. As with any client you may have some issue that comes up on an election that is unusual. That just happens.

Q. But over a range of time that sounds like a fair number to you?

A. I think that's probably correct.

[25] Q. And for your typical work representing Texas municipal utility districts, of the roughly 5 percent that goes towards election-related legal work, about what – about what percentage of that elections work would you say is typically Voting Rights Act submissions work?

A. I don't know that I could say typically because it depends on how many changes are required under a particular submission. If it's purely moving from one polling place to another, that's pretty simple. If there have been annexations plus polling places plus change of equipment, it can be more involved, and I don't know that there's anything that is typical. They don't take very long.

Q. Of all your work for municipal utility districts in Texas, what would you say the very high end has been if you had to calculate the amount of work done on Voting Rights Act submissions as a percentage of the elections work done for the particular district? What would you say the absolute high end would be?

A. I don't know.

Q. Does 20 percent –

A. I don't know that I – I can't answer your question in percentages because that's something that I just don't know how many hours I spend or – it's [26] easier to tell you how many hours typically I would spend on that, but as a percentage of all the election activities I have no idea.

Q. For a typical Voting Rights Act submission related to moving of a polling place how many hours would you typically spend on such a submission?

A. Probably two hours.

Q. And for annexation-related work?

A. Depends on how many annexations, if we can find the files easily, if there is something unusual about it.

Q. What's the range?

A. One that includes annexations probably ends up being more, from three to six hours' worth of work.

Q. How did you come to start doing work for the district? How did that relationship begin?

A. As I stated previously, I was hired by the developer to work on the creation of the district.

Q. And do you recall how you were – how you came to be first hired by the developer?

A. That would have been in probably 1984. We were hired by a local home builder, Nash Phillips Copus, to pursue the creation of District Number One and District Number Two, and I think there was a District Number Three in the original submittals.

* * *

[67] county is the voter registrar for all elections. I don't know what else to tell you.

Q. Do you have any reason to doubt that Travis County has been the sole registrant of voters for district elections –

A. No.

Q. – in the times since the district's creation?

A. No.

Q. When the district was considering a change in voting, what was the process?

A. The only changes that were – came about really were annexations and polling places. The polling place, because there was not a public building that we found available, would be determined by who was nice enough to be our election judges, and it would be held at their home.

(Discussion off the record)

MR. WALDMAN: I'm asking the court reporter to mark this document as Exhibit 12. I've given a copy to counsel.

(Exhibit 12 marked)

Q. (By Mr. Waldman) The court reporter, Ms. Collins, has shown you a document marked Exhibit 12. Ms. Collins, do you recognize this document?

[68] A. Yes. It is a preclearance submission that we did for the 2002 director election.

Q. And what change in voting were you seeking to preclear in this submission?

A. Change of a polling place.

Q. And if you recall, was the request to change approved by the Department of Justice?

A. I don't think I've ever had one that wasn't approved, so I'm going to say yes, but I don't – without seeing the letter from the Department of Justice I don't absolutely for sure.

(Exhibit 13 marked)

MR. WALDMAN: I'm asking the court reporter to mark this document Exhibit 13. It's an unBates stamped document dated May 24, 2002. For the record, a copy has been handed to counsel.

THE WITNESS: It looks like the district got approved.

Q. (By Mr. Waldman) Ms. Collins, is the document at Exhibit 13 a letter from the voting section to you approving the requested poll change sought in the March 27, 2002 Section 5 submission?

A. Yes, it is.

Q. If I can ask you to flip back to Exhibit 12.

A. Okay.

[69] Q. The second page of the letter, which I think is the third page of the document.

A. Okay.

Q. The upper right-hand corner do you see the list of prior – six prior submissions to the Department of Justice?

A. I do.

Q. Do you recall that each of the six prior submissions were approved by the department?

A. Again, I don't think I've ever had one that was not approved, so I – my supposition is that all of these were approved.

Q. During your time doing legal work for the district, other than the March 27, 2002 submission and the six proposed changes in the voting rules identified in the upper right-hand corner of page 2 of the March 27, 2002 letter, did the district submit any additional Section 5 preclearance documents?

A. I don't have any recollection of any others.

Q. Typically when you worked with a district on preclearance submissions, what was the extent of the board's involvement in the preclearance submission?

A. Normally we would put an item on the agenda and just get the board to approve having the attorney make the necessary submission.

[70] Q. And on average do you recall about how much review the board members would give to the proposed submissions?

A. I don't think I ever had one of the board members take a look at the submission.

Q. So it's your recollection that with respect to the March 27th, 2002 submission and the six prior Section 5 submissions, the board members never reviewed the draft preclearance submissions?

A. I think that's correct. Now, I will add that in the event that we had one done before a board meeting to call the election, we might have put it in the packet. I'm not going to tell you that's never happened.

Q. Starting after the initial temporary slate of directors when there was a permanent slate going forward for the district, what were the eligibility requirements for becoming a board member?

A. The same ones that I mentioned before. You had to either own property within the boundaries of the district or live in the district, plus you had to be at least 18 years old and a resident of Texas.

Q. Are there any candidate filing fees to run for district board member?

A. No.

* * *

[90] election. So I guess you could say that the board by deciding to cancel an uncontested election initiated a change that would require the Department of Justice to be notified. And as I recall, we got notice from the Texas Secretary of State that even though it was a state law on this uncontested elections, that they were making all of us file a submission on that. And we did it after the fact, and I think that's why the date in that one is in June rather than earlier, because we all went, uh-oh, we didn't know we needed to do that so we, you know, submitted it after the fact.

Q. (By Mr. Waldman) Other than the changes proposed in that – as you mentioned in every instance approved by the Department of Justice, did the district consider making any additional changes that would affect voting?

A. Not that I'm aware of.

Q. I take it, then, it's also the case that the district never considered and then declined to make a change with respect to voting as a result of concern about the preclearance process.

A. Would you repeat that, please?

MR. WALDMAN: Could you read the question back, please?

(Requested portion was read)

[91] THE WITNESS: I'm not aware of any.

Q. (By Mr. Waldman) Are you aware of any instance in which the district submitted a Section 5 preclearance application and subsequently received a request from DOJ for additional information with respect to the preclearance submission?

A. It's possible, yes.

Q. Do you recall any sitting here today?

A. It was not uncommon and its still not uncommon for us to get a call from the voting rights section saying, "You reference an order that's going to be approved by the board calling the election. Has that been approved now and can we get a copy of it?" Those sorts of follow-ups.

Q. Other than that type of follow-up, do you recall any category or specific instance of requests for additional information by DOJ after the district submitted a Section 5 preclearance?

A. Not that I recall.

Q. Has the district ever been sued in a case that involved an issue of race or discrimination on the basis of race?

A. Not that I'm aware of.

Q. Same question with respect to ethnicity.

A. No.

* * *

[110] **SIGNATURE**

I, SHARLENE N. COLLINS, have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted on the previous page.

/s/ [Illegible]
SHARLENE N. COLLINS

STATE OF Texas

COUNTY OF Travis

Before me, Susan M. Pressler, on this day personally appears SHARLENE N. COLLINS, known to me (or proved to me under oath or through _____) (description of identity card or other document) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 15th day of March, 2007.

/s/ Susan M. Pressler
NOTARY PUBLIC IN AND
FOR THE STATE OF Texas

[SEAL]

SUSAN M PRESSLER
My Commission Expires
February 24, 2008

[111] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	*	
Plaintiff	*	Civil Action No.
VS.	*	1:06-CV-01384
ALBERTO GONZALES, in his official capacity as Attorney General of the United States	*	(PLF, DST, EGS)
Defendant	*	

****

REPORTER'S CERTIFICATION
DEPOSITION OF SHARLENE N. COLLINS
FEBRUARY 22, 2007
VOLUME 1

****

I, MARSHA EVANS, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, SHARLENE N. COLLINS, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on MAR 07 2007 to the witness or to the attorney for the witness for examination, signature, and

return to ACUSCRIBE COURT REPORTERS by APR 09 2007;

That the amount of time used by each party at the deposition is as follows:

Mr. Ariel B. Waldman – 2 hours, 58 minutes.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or [112] attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me on MAR 07 2007.

/s/ Marsha Evans
MARSHA EVANS, TEXAS CSR 5100
Expiration Date: 12/31/07
Firm Registration No. 241
114 West 7th Street, Suite 750
Austin, Texas 78701
512-499-0277

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701	)	
Plaintiff,	)	CIVIL ACTION NO.
v.	)	1:06-CV-01384 (DST, PLF, EGS)
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITES STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

****

ORAL DEPOSITION OF
JOSE GABRIEL DIAZ
Thursday, February 22, 2007

****

ORAL DEPOSITION OF JOSE GABRIEL DIAZ, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 22nd day of February, 2007, from 4:29 p.m. to 5:10 p.m., before RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Weil, Gotshal & Manges, LLP, 8911 Capital of Texas Highway, Suite 1350,

pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

[2] APPEARANCES

FOR THE PLAINTIFF NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NO. ONE:

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-and-
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FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW:

Mr. Benjamin Blustein
Staff Attorney, Voting Rights Project
1401 New York Avenue, NW, Suite 400
WASHINGTON, D.C. 20005

[3] JOSE GABRIEL DIAZ,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. COLEMAN:

Q. Good afternoon, Mr. Diaz.

A. Good afternoon.

Q. Thank you for coming today. I appreciate you taking time from your afternoon to spend with us. Have – have you had your deposition taken before?

A. Not for this case.

Q. But other cases?

A. I believe so.

Q. Okay. All right. Well, I'm going to dispense with the introductories, so why don't we just – why don't we get in – you live inside the district?

A. I do.

Q. Where do you live?

A. 9400 Jenaro Court.

Q. Okay. Where – and where is that in the district?

A. Canyon Creek.

Q. Okay. Okay. Do you own –

A. I do.

Q. – a home there? How long have you lived there?

[4] A. Since approximately 2002, July.

Q. Where did you live before that?

A. Wells Branch.

Q. Okay. What do you do for a living?

A. I'm in telecom.

Q. What – what particular –

A. Internet.

Q. Internet? Who – who are you with?

A. With a company called Real Links.

Q. Do you do phone and Internet or just – I may need a business card from you.

A. Is it relevant?

Q. And were you with them when you lived in Wells Branch?

A. No, I wasn't.

Q. Was that a different job?

A. Different company.

Q. Different company. Okay. When did you live in Wells Branch?

A. Before that, about a year and a half.

Q. All right. Before that?

A. It was Kingsview Court, 11709. That's Travis.

Q. Okay. And before that? Have you always –

A. Back pretty far.

Q. – lived in the Austin area?

[5] A. For about the past 10 years.

Q. Where did you grow up?

A. Brownsville, Texas.

Q. Okay. Have you always lived in Texas?

A. No.

Q. After Brownsville – why don't you just kind of quickly walk me through where you have lived.

A. I was born in Puebla, Puebla, Mexico. Lived in Mexico City. England. Lazaro Cardenas, Michoacan. Saltillo. Cuidad Juarez. El Paso. Brownsville. And then Austin.

Q. And then Austin?

A. Mm-hmm.

Q. Tell me about your community involvement. What –

A. I –

Q. What do you do to be involved in the community?

A. I attend church regularly. Participate in some of the committees, ministry committees.

Q. Okay.

A. That's pretty much it.

Q. Have you been involved in homeowners associations or utility districts, what have you?

A. Well, I pay my dues for the homeowners

* * *

[22] there for a reason? I think I do.

Q. All right. Let me ask you this way: You've lived in El Paso.

A. Mm-hmm.

Q. Where did you live in El Paso?

A. I don't remember.

Q. On the east side, west side?

A. West side.

Q. West side. I'm – I'm building two buildings.

A. Okay.

Q. One up on Mesa Drive and one in Las Cruces.

A. You know El Paso.

Q. I'm from El Paso.

A. Oh, okay.

Q. On Mesa Drive – they're identical buildings. Identical. On Mesa Drive I have to submit my plans for preapproval and wait three or four months.

A. Mm-hmm.

Q. But in Las Cruces, I get to just build my building. Now, wouldn't I – wouldn't I think that that was a little unfair or a hassle?

MS. PERALES: Objection; the witness is being asked to describe how Mr. Coleman would feel on this situation.

Q. (By Mr. Coleman) Would a reasonable person [23] find that odd?

MS. PERALES: Objection; vague.

Q. (By Mr. Coleman) You can answer that.

A. I don't know, I'm not a builder. I'm sorry.

Q. Okay.

A. So . . . And you're asking me to be an expert at building and I don't know buildings, so –

Q. No, I'm just asking you do you under – I'm just trying to probe whether you understand the difference between a regulation that is good and that everybody agrees is good and a regulation that says in addition to following this, we want you to wait around and go through some additional administrative work.

MS. PERALES: Objection to form. It's not a question.

Q. (By Mr. Coleman) Since – since you've been in the district, you've been to one district meeting. How did – how did you come to attend that meeting?

A. I think one of my neighbors told me that there was a meeting.

Q. Okay. Do you remember what neighbor that was?

A. Howard Seigel.

Q. And you decided to attend that meeting?

A. I did.

Q. Okay. And you attended it?

[24] A. I did.

Q. Did you sign in when you went in?

A. I did.

Q. Did you speak during that meeting?

A. I did.

Q. Were you recognized?

A. I was.

Q. Did you ever – that's the – that's the only district meeting you've ever attended or wanted to attend.

A. That I've ever attended. I think I want to attend more now.

Q. You've never been – you never had a meeting you wanted to attend and were somehow –

A. No.

Q. – kept from attending?

A. No.

Q. You – because you have not voted in the district, do you have any awareness of the district voting procedures?

A. Vague, I would say. Some, enough to know . . .

Q. Tell me what you understand about the procedures for voting in the district.

A. Couldn't tell you much. You go and you vote and vote for a representative.

[25] Q. Do you know whether those procedures are fair?

A. I don't.

Q. You don't have any – but you don't have any complaints about –

A. I don't have anything that would lead me to believe they're unfair.

Q. And based on your experience, you – you don't have anything that would lead you to believe that there's anything illegal or wrong with the district's voting procedures.

A. No.

Q. The district has never discriminated against you on any basis, has it?

A. No.

Q. Let me – let me go back. I – we were – I was trying to talk about the difference between the regulation parts of what – of this Voting Rights Act and the – what I – then the preclearance –

A. Mm-hmm.

Q. – differences. Your disagreement with the lawsuit has – is primarily driven by your feeling that the preclearance is a good thing. Is that correct?

A. One of them. That's one of the reasons.

Q. Okay. Tell – tell me the others, if there are others.

[26] A. I don't feel the MUD has the authority to be involved in a case like this.

Q. That last reason, you disagree that the district should or should not file a lawsuit like this.

A. I don't think the district should be involved in a lawsuit like this.

Q. Okay. And you have expressed those feelings.

A. Yes.

Q. Just to go back and clarify, your belief that preclearance is a good thing and should continue is based not on concern that the district hasn't followed the regulations, but that preclearance by itself is a good thing.

MS. PERALES: Objection; calls for a legal conclusion with respect to whether or not the district has followed regulations.

THE WITNESS: I wouldn't know if they have or not.

Q. (By Mr. Coleman) You don't – you don't have anything that leads you to think that they're – that they haven't.

MS. PERALES: Objection; lack of foundation.

Q. (By Mr. Coleman) You're – you're not complaining that the district has not followed voting [27] regulations. Right?

MS. PERALES: Objection; calls for a legal conclusion.

MR. COLEMAN: I'm just asking if he's factually complaining that the district has not performed its elections in the right way.

THE WITNESS: I would rather not answer that.

MS. PERALES: Subject to my objection, I'll instruct the witness to go ahead and answer the question.

THE WITNESS: I don't think the MUD had the vote of the community to get involved in something like this, therefore –

MR. COLEMAN: Objection; nonresponsive.

THE WITNESS: What does that mean?

MS. PERALES: Do you need to have the question, the original question, read back to you again? Would that be helpful?

THE WITNESS: Please.

(Requested portion was read)

THE WITNESS: Okay. It's a good thing. I don't have any knowledge of the MUD not following regulations. I couldn't say whether they have or not.

Q. (By Mr. Coleman) That's not your complaint. [28] Right?

A. My complaint is the preclearance is good.

Q. I apologize. I think I have answers to these, but I just want to make sure. You spoke to the district's board members when you were in the meeting that you attended.

A. I believe so.

Q. Outside that meeting, you've not had conversations with any of them.

A. I have not.

MR. COLEMAN: I'm finished. I have no further questions right now.

MS. PERALES: I have no questions of the witness at this time.

MR. GARZA: I don't have any questions.

MR. BLUSTEIN: None.

(Deposition concluded at 5:10 p.m.)

[29] CHANGES AND CORRECTIONS

WITNESS NAME: JOSE GABRIEL DIAZ
DATE: _____

Reason Codes: (1) to clarify the record; (2) to conform to the facts; (3) to correct a transcription error; (4) other (please explain).

PAGE	LINE	CHANGE	REASON CODE

[30] _____
JOSE GABRIEL DIAZ

THE STATE OF _____)
)
COUNTY OF _____)

Before me, _____, on this day personally appeared JOSE GABRIEL DIAZ, known to me (or proved to me under oath or through

_____

(description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of March 2007.

_____
NOTARY PUBLIC IN AND
FOR THE STATE OF _____

[31] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701	)	CIVIL ACTION NO. 1:06-CV-01384 (DST, PLF, EGS)
Plaintiff,	)	
v.	)	
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

REPORTER'S CERTIFICATION
DEPOSITION OF JOSE GABRIEL DIAZ
Thursday, February 22, 2007

I, RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, JOSE GABRIEL DIAZ, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on February 26, 2007 to the witness or to the attorney

for the witness for examination, signature and return to me by _____, 2007.

That the amount of time used by each party at the deposition is as follows:

[32] Mr. Gregory S. Coleman – 37 minutes
Ms. Nina Perales – 0 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Gregory S. Coleman, attorney for Plaintiff

Ms. Nina Perales and Mr. Carlos Becerra, attorneys for MALDEF

Mr. Jose Garza, attorney for Texas Rio Grande Legal Aid, Inc.

Mr. Chris Herren and Ms. Christy A. McCormick, attorneys for U.S. Department of Justice

Mr. Benjamin Blustein, attorney for Lawyers' Committee for Civil Rights Under Law

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 26th day of February, 2007.

RANDALL N. FINCH, Texas CSR #504
Expiration date: 12/31/2008
Fredericks-Carroll Reporting
Firm Registration No. 82
7800 Shoal Creek Blvd., Suite 200-W
Austin, Texas 78757 (512) 477-9911

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701	)	
Plaintiff,	)	CIVIL ACTION NO.
v.	)	1:06-CV-01384 (DST, PLF, EGS)
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITES STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

****

ORAL DEPOSITION OF
DANA DEBEAUVOIR
Monday, February 26, 2007

****

ORAL DEPOSITION OF DANA DEBEAUVOIR, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 26th day of February, 2007, from 9:26 a.m. to 11:35 a.m., before RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Weil, Gotshal & Manges, LLP, 8911 Capital of Texas Highway, Suite 1350,

pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

[2] APPEARANCES

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[6] DANA DEBEAUVOIR,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. COLEMAN:

Q. Good morning.

A. Good morning.

Q. Greg Coleman. Thank you for coming today. May I assume you've had your deposition taken before?

A. I have.

Q. More times than –

A. Not a lot, but occasionally.

Q. Okay. If you have any questions about how the process works, you're free to ask counsel or me and we'll make sure things are running.

A. Thank you.

Q. If you would, you've been designated to testify for the county in this case. Would you basically describe for me your position with the county and what your job duties entail?

A. Yes. I'm the countywide Travis County elected clerk. It is a four-year post. I was just re-elected at the November 2006 election and took office January 1 for a four-year term. I'm starting my 21st year.

And county clerks in Texas do a variety of jobs. It's – it varies from county to county. [7] Basically, I'm the recorder. I serve as the clerk of the court for civil, criminal and probate, also for commissioners' court, and I conduct elections, most recently under contract with virtually all of the jurisdictions in Travis County to do their elections for them.

Q. How many different governmental entities are there inside the county, including municipal utility districts, water districts –

A. Mm-hmm.

Q. – school districts, cities, other –

A. Mm-hmm.

Q. – types of entities?

A. Let me answer your question this way: I do business with about a hundred and seven. I think that's everybody, but there might be a few others out there. So approximately a hundred and seven.

Q. And of those hundred and seven, could you give me a rough breakout of how many are city, town-type entities, how many are school districts, how many are utility districts? Rough –

A. Roughly. There are approximately – I hope I have this right, approximately 38 cities, approximately 19 school districts. Capital Metro. ACC.

MR. HICKS: You might say what ACC is.

[8] THE WITNESS: Oh, I'm – excuse me, the Austin Community College.

Q. (By Mr. Coleman) Mm-hmm.

A. And then the rest are what we would describe as municipal utility districts, fire districts, just other kinds of smaller entities.

Q. Do fire districts have elections?

A. Mm-hmm.

MR. HICKS: Say yes or no.

THE WITNESS: Yes, sir.

Q. (By Mr. Coleman) You've been asked to bring some documents today and your counsel has a variety of documents. Have you had a chance to speak with your counsel about those documents?

A. We've gone over them, yes, sir.

Q. Okay.

MR. COLEMAN: Mr. Hicks, if I could ask you to produce –

MR. HICKS: Yes.

MR. COLEMAN: – the documents and –

MR. HICKS: All right. You want me to kind of describe what – the piles I'm giving you or you want me to just slide them across the table to you? You tell me.

MR. COLEMAN: Maybe for the record why [9] don't you give a very brief description.

MR. HICKS: Okay. I have what – overall what we tried to bring is every submission that Trav – Section 5 submission that Travis County has done with respect – that involves something concerning the MUD specifically. It may be the – the MUD piece may be a teeny piece of the big submission, but we tried to bring every one. That includes the 2004 joint election agreement with the MUD, the 2006 joint election agreement with the MUD.

So I'll give you the 2006 pile, I'll call it, that includes every submission, every no objection letter and some of the attachments that came with it, along with a copy of the actual agreement. Same thing for 2004.

We brought a 2005 submission that embraces the 330 – Precincts 333/343 split. Because some questions had come in from Ms. Perales, we brought a list of the bilingual workers by precinct for the November general election.

Then we also brought some material – I don't have extra copies of these. These are essentially advisories or kind of rah-rah statements, I guess you could call it that – from the county clerk to election – presiding judges, elections. This is a

* * *

[74] policing. They weren't there to stop people from voting, they were there to assist them to help them do that.

Q. Mm-hmm.

A. Those are some examples of some of the things I've -- I've seen myself. I also believe that it's important to reach out to all kinds of communities in whatever way helps them. So it's – it's almost like when in Rome, do as the Romans do. So for the black communities you've got the neighborhood associations and the churches. For the Hispanic community, it's just really important to speak Spanish and to be present through Spanish language media. And I do PSA's in Espanol for Movecion, for – I've done them for years. I – I've studied Spanish in Mexico. I try very hard. Mi Espanol es morqueantes. You know, it could be better.

I – I study up before I do a PSA or even an announcement. I hire Marta Kotera, who is my Spanish contractor, and I – and I run things back and forth to – through her, not only for official notices but for any kind of important press release, even, or special instructions to voters. Marta and I will talk about, now, this needs to be in vernacular Spanish. I don't want it to be too overly formulist – formal, [75] getting confused with terms. Let's make it understandable.

Q. Thank you.

Would it be fair, then, to say that you've made affirmative efforts in training your poll workers so that their treatment of all voters is non-discriminatory?

A. Yes. And if I may add, increasingly affirmative. I don't think we've still done enough.

Q. And would it also be fair to say that you've done – that you've made affirmative efforts to reach out to Latino and African-American voters especially since you've been county clerk?

A. Yes. The early voting program is the perfect example. We put the – that early voting program in – you know, equitably distributed it and put it in commercial areas. We did not put it in the back of a constable's office or something like that. It's retail approach.

Q. And the retail approach is so that you can come across more voters. Is that right?

A. We go where the voters already are. We don't expect them to come to us.

Q. And would you agree with me that if somebody doesn't have other voters in their family, for example, [76] if their parents never voted, that it might take special efforts to get that person to become a voter?

A. Yes. And I really think that applies across the board. The – it's the socioeconomic factors that really complicate that.

Q. And would you say that historically Hispanic and African-American voters have had lower participation rates –

A. Yes.

Q. – than Anglos?

A. That's clear. Those statistics are all over the place.

Q. One moment, please. (Brief pause)

MS. PERALES: Thank you very much. I pass the witness.

FURTHER EXAMINATION

BY MR. SPITAL:

Q. Good morning, Ms. DeBeauvoir. My name is Sam Spital. I represent the Lewis intervenors, who are African-American voters who live in the MUD.

A. Okay.

Q. I just have a few questions. It won't take long. My first question is about who supervises voter registration. For vote –

A. Okay.

[77] Q. For eligible voters in the MUD, is it the county or the MUD that supervises voter registration?

A. I – I don't know. And here's why. I think your answer is the voter registrar that supervises registration in all of our districts, not necessarily the MUD. I don't know of any obligation. So I have to say I don't know, but I think you need to be looking at voter registration.

Q. Okay. And the voter registrar is a county official?

A. Yes.

Q. Okay. Thank you.

The other – just a few other questions. I wanted to ask you about the ballot requirements that I think Mr. Coleman asked you about earlier.

A. Okay.

Q. I think, if I remember correctly, you characterized the ballot requirements as heavy? Is that –

A. For a bailout?

Q. Yeah. For a bailout.

A. It looked – looked like you had to go through a lot.

Q. And is that your assessment based on having looked at the statute primarily?

* * *

[82] Q. Yes.

A. – to add to the number of precincts?

Q. Yes.

A. Yes.

Q. And that's all required by state law. Is that correct?

A. Yes, it is.

Q. Federal law has nothing to do with any of those problems.

A. I don't know, because we have been in a mix of realignment and redistricting, and, of course, that would be federal.

Q. The redistricting is a result of federal court orders?

A. Mm-hmm.

Q. Now, you were asked questions about the voter registration lists. Are you providing these voter registration lists to the – to the MUD?

A. I coordinate it, yes.

Q. Yes. All right. And you provide those voter registration lists to a whole – large number of different people, don't you?

A. Yes, I do.

Q. Including political consultants, candidates, marketers.

[83] A. Mm-hmm.

Q. Lot of different people request those lists.

A. Right.

Q. Do they not?

A. Let's make the distinction between my role as coordinator just for the polling places. If you were a – a political consultant you would be dealing directly with the voter registrar, your – with them and not with me.

Q. I guess I'm talking in terms of the county. County provides those for all –

A. Okay. The county does do that.

Q. And you are aware of that.

A. I am aware of it.

MR. KORBEL: No further questions.

FURTHER EXAMINATION

BY MR. HERREN:

Q. My name is Chris Herren. I'm an attorney for the Department of Justice in Washington. I had just I believe one question for you. You had testified earlier about HAVA and I thought I heard you say that the HAVA money came from the Department of Justice through the Secretary of State. Is that what you testified to?

A. I – did I get that wrong? I think that's [84] right.

Q. Doesn't the money in fact come from the U.S. Election Assistance Commission through the Secretary of State?

A. Well, yeah, we do have a – that – that is a fair distinction, yes. I serve on the standards board of the EAC and should have made that clearer.

Q. So – but the money actually comes from the EAC.

A. The EAC, yes. They – they channel it now.

MR. HERREN: Thank you very much. That's all I have.

THE WITNESS: Okay. Correct.

MR. COLEMAN: Okay. I think we can wrap this up. Thank you, Ms. DeBeauvoir. Thank you for coming.

THE WITNESS: You're quite welcome. Thank you very much.

(Deposition concluded at 11:35 a.m.)

[85] CHANGES AND CORRECTIONS

WITNESS NAME: DANA DEBEAUVOIR
DATE: _____

Reason Codes: (1) to clarify the record; (2) to conform to the facts; (3) to correct a transcription error; (4) other (please explain).

PAGE	LINE	CHANGE	REASON CODE

DANA DEBEAUVOIR

THE STATE OF _____)
)
COUNTY OF _____)

Before me, _____, on this day personally appeared DANA DEBEAUVOIR, known to me (or proved to me under oath or through

_____

(description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of March 2007.

_____
NOTARY PUBLIC IN AND
FOR THE STATE OF _____

[87] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701	) CIVIL ACTION NO. 1:06-CV-01384 (DST, PLF, EGS)
Plaintiff,	
v.	
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	

REPORTER'S CERTIFICATION
DEPOSITION OF DANA DEBEAUVOIR
Monday, February 26, 2007

I, RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, DANA DEBEAUVOIR, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on March 1, 2007 to the witness or to the attorney for

the witness for examination, signature and return to me by _____, 2007.

That the amount of time used by each party at the deposition is as follows:

[88] Mr. Gregory S. Coleman – 39 minutes
Ms. Nina Perales – 12 minutes
Mr. Samuel Spital – 4 minutes
Mr. George Korbel – 2 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Gregory S. Coleman, attorney for Plaintiff

Ms. Nina Perales, attorney for MALDEF

Mr. George Korbel, attorney for Texas Rio Grande Legal Aid, Inc.

Mr. Chris Herren, attorney for USDJ

Mr. Benjamin Blustein, attorney for Lawyers' Committee for Civil Rights Under Law

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 1st day of March, 2007.

RANDALL N. FINCH, Texas CSR #504
Expiration date: 12/31/2008
Fredericks-Carroll Reporting
Firm Registration No. 82
7800 Shoal Creek Blvd., Suite 200-W
Austin, Texas 78757 (512) 477-9911

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	)	
VS.	)	CIVIL ACTION NO.: 1:06-CV-01384 (PLF, DST, EGS)
ALBERTO GONZALES, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES	)	

****

ORAL DEPOSITION OF

KERRIE JO QUALTROUGH

FEBRUARY 26, 2007

VOLUME 1

****

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	§	
VS.	§	Civil Action No. 1:06-CV-01384 (PLF, DST, EGS)
ALBERTO GONZALES, in his official capacity as Attorney General of the United States	§	

****

ORAL DEPOSITION OF

KERRIE JO QUALTROUGH

FEBRUARY 26, 2007

VOLUME 1

****

ORAL DEPOSITION OF KERRIE JO QUALTROUGH, produced at the instance of the Defendant-Intervenors, Texas State Conference of NAACP Branches and Austin Branch of the NAACP, in the above-styled and numbered cause on the 26th day of February, 2007, at 12:24 P.M., before Michael A. Johnson, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand, at the Texas Capital Bank Conference Room, 114 West 7th Street, Austin, Texas, pursuant to Notice of Oral Deposition, and in accordance with the Federal Rules of Civil Procedure.

[2] APPEARANCES

ON BEHALF OF THE PLAINTIFF NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE:

Gregory S. Coleman
Christian J. Ward
WEIL, GOTSHAL & MANGES, L.L.P.
8911 Capital of Texas Highway
Building One, Suite 1350
Austin, Texas 78759

ON BEHALF OF THE DEFENDANT ALBERTO GONZALES, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES:

Chris Herren
U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION
950 Pennsylvania Avenue, NW
Room 7254 NWB
Washington, D.C. 20530

ON BEHALF OF THE INTERVENOR TRAVIS COUNTY:

Max Renea Hicks
ATTORNEY AT LAW
101 West 6th Street, Suite 504
Austin, Texas 78701

ON BEHALF OF THE INTERVENORS LISA AND GABRIEL DIAZ:

Nina Perales
Diego M. Bernal
MALDEF
110 Broadway, Suite 300
San Antonio, Texas 78205

[3] ON BEHALF OF THE DEFENDANT-INTERVENORS RODNEY AND NICOLE LOUIS:

Sam Spital
HOLLAND & KNIGHT, L.L.P.
195 Broadway, 24th Floor
New York, New York 10007-3189

ON BEHALF OF THE DEFENDANT-INTERVENORS TEXAS STATE CONFERENCE OF NAACP BRANCHES AND AUSTIN BRANCH OF THE NAACP:

Daniel A. Zibel
WILMER CUTLER PICKERING HALE & DORR, L.L.P.
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006

Benjamin Blustein
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW, Suite 400
Washington, D.C. 20005-2124

ON BEHALF OF THE DEFENDANT-INTERVENORS ANGIE GARCIA, JOVITA CASAREZ AND OFELIA ZAPATA:

George Korbel
TEXAS RIOGRANDE LEGAL AID, INC.
1111 North Main Street
San Antonio, Texas 78212

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KERRIE JO QUALTROUGH DEPOSITION

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EXHIBIT DESCRIPTION OF EXHIBIT PAGE

NO. 21 2/19/04 Northwest Austin MUD No. 1 Board of Directors Minutes.....60

* * *

[73] percentages regarding demographics. Do you see that?

A. Uh-huh. Yeah.

Q. Can you tell me what you were asking the board to do there?

A. If they were – if we could rely on those numbers. I probably asked them if they knew where it came from and if they knew of any reason to change them. I mean, that – it's kind of a difficult issue since they don't have – the board doesn't keep that information. So we had to rely on the previous filing.

Q. If I can ask you to keep your finger there but flip forward – well, no, we've already gone over that. I don't think I need to ask you. But only just to say in sort of a summing up way, it would be – it would be correct to say that following this meeting and any subsequent conversations you might have had with board members about demographics, that the final submission that was sent to the Department of Justice re-presented demographic information from the 2002 submission; isn't that right?

A. I believe so. If you're asking me did – was the information in the 2004 submission the same as in 2002?

Q. Yes.

A. I believe it was. I don't recall making any [74] changes to that. I wouldn't have a basis.

Q. And that would be the demographic information, right?

A. That's what I thought you were referring to.

Q. Yes. I was just trying to keep it clean.

A. Yeah. I mean, that's, yeah, limited to that.

Q. So then would it be fair to say that you did not make an independent investigation of the demographics for the MUD set out in the preclearance letter?

A. No, I did not.

Q. Now, in the draft that is attached to this meeting from February of '04 on the page that's marked Bates 6201 on the third line up from the bottom where you're talking about demographics here –

A. Uh-huh.

Q. – on the second line, do you see where it says less than 5 percent families with Spanish surnames?

A. Uh-huh.

Q. Do you know what the significance might be of that 5 percent number?

A. Significance in what way?

Q. I mean, is there anything significant about that 5 percent number being used to, say, less than 5 percent? Would it have been important if it was more

* * *

[90] CORRECTIONS AND SIGNATURE

PAGE/LINE	CORRECTION	REASON FOR CHANGE
pg 85/21	"Absence"	should be "assets"

I, KERRIE JO QUALTROUGH, have read the foregoing deposition and hereby affix my signature that same is true and correct except as noted herein.

/s/ Kerrie Jo Qualtrough
KERRIE JO QUALTROUGH

STATE OF Texas)
COUNTY OF Travis)

Subscribed and sworn to before me by the said witness, KERRIE JO QUALTROUGH, on this the 9 day of April, 2007.

/s/ William Johnson
NOTARY PUBLIC IN
AND FOR THE STATE
OF Texas

[SEAL]
WILLIAM JOHNSON
NOTARY PUBLIC
STATE OF TEXAS
COMMISSION EXPIRES:
MAY 18, 2010

My Commission Expires: May 18, 2010

[91] CERTIFICATE

I, Michael A. Johnson, Certified Shorthand Reporter in and for the State of Texas, certify that on the 26th day of February, 2007, I reported the Oral Deposition of KERRIE JO QUALTROUGH, after the witness had first been duly cautioned and sworn to testify under oath; said deposition was subsequently transcribed by me and under my supervision and contains a full, true and complete transcription of the proceedings had at said time and place.

I further certify that I am neither counsel for nor related to any party in this cause and am not financially interested in its outcome.

GIVEN UNDER MY HAND AND SEAL of office on this 7 day of March, 2007.

/s/ Michael A. Johnson
Michael A. Johnson,
Texas CSR 5891
Expiration Date: 12/31/2008
Firm Registration No. 241
114 West 7th Street, Suite 750
Austin, Texas 78701
(512) 499-0277

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff,	)	CIVIL ACTION NO. 1:06-CV-01384 (DST, PLF, EGS)
v.	)	
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

****

ORAL DEPOSITION OF
NATHANIEL LESANE
Monday, February 26, 2007

****

ORAL DEPOSITION OF NATHANIEL LESANE, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 26th day of February, 2007, from 3:28 p.m. to 4:01 p.m., before RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Weil, Gotshal & Manges, LLP, 8911 Capital of Texas Highway, Suite 1350,

pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

[2] APPEARANCES

FOR THE PLAINTIFF NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NO. ONE:

Mr. Gregory S. Coleman
–and–
Mr. Christian J. Ward
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(512) 527-0698 Fax

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–and–
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FOR THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION:

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–and–
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FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW:

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[3] FOR THE LEWIS INTERVENORS:

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(212) 385-9010 Fax

FOR THE WITNESS NATHANIEL LESANE:

Mr. Jeremy Wright
KATOR, PARKS & WEISER, P.L.L.C.
812 San Antonio Street, Suite 100
Austin, Texas 78701 (512) 312-0600
(512) 477-2828 Fax

[4] NATHANIEL LESANE,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. COLEMAN:

Q. Mr. Lesane, thank you for coming here this afternoon. Have you had a deposition taken before?

A. First time.

Q. All right. It's like skydiving. It's – you know, it's always good to do something once.

A. Sure.

Q. Go through it. You live in the district right now?

A. Yes.

Q. Can you tell me where you live?

A. My address is 9529 Corbe Drive, Austin, Texas, in the Canyon Creek subdivision.

Q. Okay. How do you like living in Canyon Creek?

A. It's quiet. I like it.

Q. How long have you been there?

A. We actually moved into the home in July of 2000. So almost seven years, six and a half years or so.

Q. Okay. Where did you move from?

A. Portland, Oregon.

Q. Okay. How long did you live in Portland, [5] Oregon?

A. About 13 and a half years.

Q. And before that?

A. Phoenix, Arizona.

Q. How long were you in Phoenix?

A. Three and a half years.

Q. What did you do in Phoenix?

A. I was an engineer with Intel Corporation.

Q. Does that also explain Portland, then?

A. Yeah.

Q. The whole time?

A. Yeah.

Q. Okay. And before Phoenix?

A. Austin.

Q. All right. Also Intel?

A. Intel, Texas Instruments, and I went to college at St. Edward's University.

Q. Okay. So your college and adult life has been Austin, Phoenix, Portland and Austin?

A. Correct.

Q. Did – did you grow up in the Austin area or come here before –

A. I grew up in south Florida.

Q. Do you remember what county?

A. St. Lucie County.

* * *

[10] A. Can I mention Lisa's name?

MR. WRIGHT: I object to anything that's covered by the attorney-client privilege.

MR. COLEMAN: Well, I'm entitled to know who he has spoken to and when, without knowing the – necessarily the content of that conversation. So if . . .

MR. WRIGHT: I – I can direct the deponent to answer with regard to which attorneys he spoke to.

THE WITNESS: Okay. I spoke to Lisa Graybill, and I think it was the end of October, beginning of November of last year, 2006.

Q. (By Mr. Coleman) Okay. And did these individuals call you on the telephone? Again, without what any individual said, but did they call on the telephone, come to the house?

A. They came to my home.

Q. All right. And again, without disclosing the conversations themselves, after some discussion you

made a determination to come into this lawsuit as an intervenor?

A. Correct.

Q. Okay. Okay. Again, in your own words, you – tell me why you joined this lawsuit.

A. Basically, the right to vote has been [11] long-fought, hard-fought. And after listening to Lisa explaining the situation, I came to the conclusion that any changes in the Voting Rights Bill, or that section of the Voting Rights Bill that the MUD is looking to have removed, just doesn't seem right under the – under any circumstance.

Q. And can you tell me to the best of your ability what – what your understanding is of what the district wants to do with – with the lawsuit?

A. All that I understand is that there is a section of the Voting Rights Bill that basically requires a district to have – as I recall, to have – let's see, I guess Section 5 that – that requires review by the federal government if they want to have that section removed.

Q. When you say to have – to have that section removed, I'm – I'm not sure I understood that.

A. There's a – I think it's Section 5 of the Voting Rights Bill.

Q. Okay.

A. Well, my understanding is that that section requires review by federal government if there are changes to be made within the district.

Q. Okay. Do you happen to know whether that was something that was in force when you lived in Portland, [12] Oregon?

A. I don't remember any – any specific things going on in Portland related to voting rights.

Q. Okay. How about Phoenix?

A. That was a long time ago. I don't remember anything.

Q. Okay. Let me go back to your understanding of Section 5 just a little bit. Do you understand that the Voting Rights Act may have, you know, a variety of sections in it that do different things?

A. I'm sure.

Q. And do you understand that some of those sections require governmental entities to – to make sure that the voting is available for everybody, that there's no discrimination in voting, that is separate from the – what we call Section 5, the federal government review?

A. As much as I can understand, yes.

Q. Okay. And I – and I just want to make sure and ask, do you understand that what the – what the district is seeking to do doesn't affect any of those other sections that re – that require, you know, that

all – these governmental entities to – to be fair in their elections and to not discriminate against anybody, to make sure that everybody can exercise their [13] right to vote?

A. The only thing that I understand is what appears to be related to Section 5 of the Voting Rights – Voting Rights Act.

Q. Okay. So you do, then, understand the difference between some sections and the – the Section 5 that's at issue here?

A. I am not an expert on that – on the voting – on the Voting Rights Bill, but, you know, just specific to this particular section.

Q. Okay. Mr. Lesane, did you bring any documents today with you?

A. No.

MR. COLEMAN: Do you know – did we – are there any?

MR. WRIGHT: He was provided with a – the notice and there are no responsive documents.

MR. COLEMAN: Okay. I just wanted to check. Thank you.

Q. (By Mr. Coleman) Mr. Lesane, I would like to just follow up a little bit with my questioning. And I – you voted in several recent elections.

A. Mm-hmm.

Q. And I want to make sure that I understand the basis of why you're in the lawsuit. And you've [14] indicated that you have a feeling that Section 5 should not be changed or there shouldn't be any changes relating to Section 5. Setting that aside, I want to talk a little bit, just to make sure, when you voted in 2006, you felt you were able to vote fine, there were no problems with the – with voting that year. Right?

A. Correct.

Q. And you've not – you've not alleged any discrimination or improper voting procedures with regard to that election. Is that right?

A. Correct.

Q. Is the same true of 2004?

A. Correct.

Q. And 2002?

A. Correct.

Q. 2000, if – I know – if you voted in an election in 2000?

A. I tend to vote in every general election. So, yes.

Q. And if I may, I know you were in Portland in 1998, but is the same true there?

A. Correct.

Q. Okay. Do you know any of the members of the board of the district, of the –

A. The MUD?

[15] Q. The – the MUD district?

A. No, I do not.

Q. Have you been to any board meetings?

A. I have not been to any board meetings. I've only been to homeowners' association meetings where board issues – I mean MUD issues have been discussed.

Q. What – what homeowner meetings have you been to? Back – let me back up. About how many – in the nearly seven years you've been in the district, about how many homeowner meetings have you been to?

A. Probably at most three or four.

Q. Okay. Have you been any – to any in the last year or two?

A. Within the last two years, but not – I don't think in the last year, no.

Q. So maybe in like 2005?

A. Yes.

Q. What – do you have any recollection of that meeting or what the issues might have been?

A. In particular it had to do with the – the lawsuit. One of the items on – on the agenda was discussion about what was happening with the lawsuit.

Q. Mm-hmm.

A. Against the MUD.

Q. Against them?

[16] A. Against the – against Austin.

Q. Against the City of Austin?

A. Yes.

Q. Do you know why that would have been on the homeowners' association agenda?

A. No, I don't.

Q. Is it – would it have just been because people in the district are interested in what's happening to that?

A. I would believe so.

Q. Do most of the homeowners hope that the district wins that lawsuit?

A. I – I can't tell you.

Q. It would be a good thing to get a thousand dollars off your taxes each year, though. Right?

A. Sure.

Q. Okay. Any of the prior homeowners meetings that you went to, were – were there other district – MUD district issues in those or is that the one you're talking about?

A. This is the one – this is the only one that I recall.

Q. Okay. I want to go back. You've not attended any of the district meetings. I think you said that. Is that right?

[17] A. Correct.

Q. And do you know the names of or know by sight any of the members of the district board of directors?

A. No, I do not.

Q. Okay. And to your knowledge have not had any interaction with any of those individuals?

A. Not to my knowledge, I have not.

Q. You – do you know Don Zimmerman?

A. Yeah, I know Don.

Q. Okay. Don is on the board.

A. Okay.

Q. Do you know Bill Ferguson?

A. I don't know him.

Q. Do you know Ed Swarthout?

A. No, I do not. Can I clarify?

Q. Sure. Of course.

A. Don Zimmerman, I know of him. I think he ran for an election, or was running for –

Q. The House –

A. Not related to MUD.

Q. The House District 50?

A. Yes.

Q. Okay.

A. And I met him. I think he was walking through the neighborhood.

[18] Q. Okay. Is that the only time –

A. Yes.

Q. – you would have met him?

A. That's the only time.

Q. Only time you would have talked to him or had any communications with him?

A. Correct.

Q. Do you know George Frederickson?

A. No, I do not.

Q. Do you know Alan Weiss?

A. No.

Q. Karen Temborius?

A. No.

Q. If we can go off the record for a few minutes . . .

(Recess from 3:53 to 3:55 p.m.)

Q. (By Mr. Coleman) Mr. Lesane, I'm – in just reviewing my notes, we talked a little bit about elections and things like that.

A. Mm-hmm.

Q. And I just want to clarify the record on this. Given your involvement in elections and absence of any complaint about the way that they've been done and – here or in other places where you've lived, would it be safe to say that your involvement in this suit is not a [19] disagreement with anything that's happened in elections in the district, but is a – a philosophical feeling that Section 5 ought to be left alone?

A. Correct.

Q. Let me follow up. With respect to Section 5, are you familiar with a part of the law that allows a governmental entity to say, "We have been living up to the Voting Rights Act, and so at some point we should not have to submit to the federal government for review anymore"? Are you familiar with that section generally?

A. That is Section 5.

Q. Okay.

A. As I understand it.

Q. Okay. And so let – let me clarify. Is – is your feeling that an entity like the district, if it could show that it's acted responsibly for a period of years, that it should not be exempted from further federal review?

A. Could you re –

MR. WRIGHT: I'm going to object. Sort of a vague question.

MR. COLEMAN: Well, I'm just asking – okay.

MR. WRIGHT: I mean, he's not an [20] attorney. I don't think he –

MR. COLEMAN: No, I –

MR. WRIGHT: – could follow that question.

Q. (By Mr. Coleman) You understand that there is a section that lets government entities out from federal review after a period of time. At all – are you – are you or are you not –

A. I'm not.

Q. – at all familiar with --

A. Not familiar.

Q. Okay.

MR. COLEMAN: Okay. Could we go back? I just wanted to see his answer to the question before that.

(Discussion off the record)

Q. (By Mr. Coleman) Okay. You don't know whether a governmental entity can stop submitting things for review by the federal government after a period of time or after making some showing to the federal government or not?

A. I do not know that.

Q. Okay. If I were to tell you that a procedure like that exists, that an entity could go and say, "Here's some paperwork. We've been doing things okay," [21] is – would you object to entities being allowed to do that or is your objection simply to trying to get out from under the federal review at all?

MR. WRIGHT: Objection. It's vague and calls for speculation.

Q. (By Mr. Coleman) You can answer that if you can understand it.

A. I understand. And my answer would be the latter.

Q. And the latter being . . .

A. Object to the ability to get out of that review.

Q. At all?

A. At all.

Q. Under any circumstances?

A. Under any circumstance.

MR. COLEMAN: I pass the witness.

MR. WRIGHT: No questions.

MS. PERALES: I have no questions.

MR. HERREN: No questions.

MR. COLEMAN: Mr. Lesane, thanks for coming today.

THE WITNESS: Sure.

(Deposition concluded at 4:01 p.m.)

* * *

[23] CHANGES AND CORRECTIONS

WITNESS NAME: NATHANIEL LESANE

DATE:_____

Reason Codes: (1) to clarify the record; (2) to conform to the facts; (3) to correct a transcription error; (4) other (please explain).

PAGE/LINE	CHANGE	REASON CODE

_____

[24] NATHANIEL LESANE

THE STATE OF _____)
)
COUNTY OF _____)

Before me, _____, on this day personally appeared NATHANIEL LESANE, known to me (or proved to me under oath or through

_____

(description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of March 2007.

_____
NOTARY PUBLIC IN AND
FOR THE STATE OF _____

[25] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff,	)	CIVIL ACTION NO.
v.	)	1:06-CV-01384 (DST, PLF, EGS)
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

REPORTER'S CERTIFICATION
DEPOSITION OF NATHANIEL LESANE
Monday, February 26, 2007

I, RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, NATHANIEL LESANE, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on March 1, 2007 to the witness or to the attorney for

the witness for examination, signature and return to me by _____, 2007.

That the amount of time used by each party at [26] the deposition is as follows:

Mr. Gregory S. Coleman – 29 minutes
Ms. Nina Perales – 0 minutes
Mr. Samuel Spital – 0 minutes
Mr. George Korbel – 0 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Gregory S. Coleman, attorney for Plaintiff

Ms. Nina Perales, attorney for MALDEF

Mr. George Korbel, attorney for Texas Rio Grande Legal Aid, Inc.

Mr. Chris Herren, attorney for USDJ

Mr. Benjamin Blustein, attorney for Lawyers' Committee for Civil Rights Under Law

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 1st day of March, 2007.

RANDALL N. FINCH,
Texas CSR #504
Expiration date: 12/31/2008
Fredericks-Carroll Reporting
Firm Registration No. 82
7800 Shoal Creek Blvd., Suite 200-W
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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff, v. ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITES STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	CIVIL ACTION NO. 1:06-CV-01384 (DST, PLF, EGS)

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ORAL DEPOSITION OF
GARY BLEDSOE
Monday, February 26, 2007

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ORAL DEPOSITION OF GARY BLEDSOE, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 26th day of February, 2007, from 4:56 p.m. to 5:58 p.m., before RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Weil, Gotshal & Manges, LLP, 8911 Capital of Texas Highway, Suite 1350,

pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

[2] APPEARANCES

FOR THE PLAINTIFF NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NO. ONE:

Mr. Gregory S. Coleman
-and-
Mr. Christian J. Ward
WEIL, GOTSHAL & MANGES, LLP
8911 Capital of Texas Highway
Building One, Suite 1350
Austin, Texas 78759 (512) 349-1937
(512) 527-0698 Fax

FOR THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (MALDEF):

Ms. Nina Perales
-and-
Mr. Diego Bernal
Attorney at Law
110 Broadway, Suite 300
San Antonio, Texas 78205 (210) 224-5476
(210) 224-5382 Fax

FOR THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION:

Mr. Chris Herren
-and-
Ms. Christy A. McCormick
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Washington, D.C. 20530 (202) 305-0609
(202) 327-3961 Fax

FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW:

Mr. Benjamin Blustein
Staff Attorney, Voting Rights Project
1401 New York Avenue, NW, Suite 1400
Washington, D.C. 20005 (202) 662-8320
(202) 628-2858 Fax

[3] FOR THE LEWIS INTERVENORS:

Mr. Samuel Spital
HOLLAND & KNIGHT, LLP
195 Broadway, 24th Floor
New York, New York 10007-3189 (212) 513-3454
(212) 385-9010 Fax

[4] GARY BLEDSOE,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. COLEMAN:

Q. Mr. Bledsoe, good afternoon.

A. Good afternoon, Mr. Coleman. How are you today?

Q. I'm well, thanks. Thanks for coming over.

A. Thank you.

Q. Did you bring any documents today in response to deposition notice that you received?

A. No. I – looking at that, it appeared that any documents that we would have had that was

responsive to that would have already been turned over, I guess, the disclosures or what have you. I think the transcripts from the hearings we've had is one thing that really kind of stands out and there – I guess there have been a lot of documents probably in the public domain, like, you know, decisions of the Supreme Court or what have you.

Q. All right. You're here on behalf of two organizations today?

A. Yes, the NAACP State Conference of Texas and the Austin branch of the NAACP.

Q. And are those entities affiliated?

[5] A. Yes, we're all units or affiliated with the national organization in Baltimore, Maryland.

Q. Can you tell me how the Texas State Conference and Austin branch are related?

A. The Texas State Conference is essentially in oversight relationship to the Austin branch. There are 70 some odd branches in the State of Texas, and the state conference has oversight responsibility over those, making sure they adhere with national rules and things of that nature.

Q. Is the – is the Texas entity, then, different in nature – in nature than the other local branches? You say it has oversight responsibility. Does it – is that its primary function?

A. No, it also has civil rights responsibility as well. It primarily handles matters on the state level

that – matters of importance to individuals of the African-American community or minority – ethnic and racial minorities in the state, but it also has the other function of helping to train and guide local units.

The local units have that same civil rights function in their own communities, but in terms of state issues, those are driven by the state organization, and local issues before your city

* * *

[18] defer or make contact to try to use individuals out here to the extent that they could, because I know when I go in and vote in – in primary elections, I usually see the same people in my precinct where I vote that I see when I vote in city elections.

So, I mean, it just seems logical that the people know the process; they know the election law, and so you go to those folks and you – you defer. So – I mean, but I don't have personal knowledge of that It just seems logical from having been involved in the political process myself.

Q. Let me clarify. Are you saying that there are people who live in the district who are involved in city or district or are you saying that the district itself would be somehow involved in a city election?

A. I don't think those are mutually exclusive. I think they could be – it could be either way. I mean, it – and you would have to look at, you know, how you do that. Whether you pick up the telephone and the

county clerk calls up someone with the MUD and says, "Look, we need to have elections. Do you have some folks that you can recommend to run the election?" But, I mean, I'm – obviously, there's some overlap with that.

Q. You're saying obviously there could be some [19] overlap with that.

A. You're right. That's – that's – that's –

Q. You don't –

A. That's better put than what I said, yeah.

Q. You don't have any personal or organizational knowledge –

A. That is true.

Q. – that has ever happened, do you?

A. That is true.

Q. Have you personally or has your organization gathered information about elections that the district has conducted in the past several years?

A. No. I don't believe we've actually gone out to collect information.

Q. So sitting here today as the representative of these two organizations, you can't share with me any information about the way district has conducted its elections at any time, can you?

A. We haven't investigated how the district has carried out its elections.

Q. So you have no information relating to the district's elections. Is that safe to say?

A. No information relating to its elections . . . I'm not sure that that's true. I don't think they've ever had African-Americans elected or things of that – [20] that nature. But in terms of – you would have to really specify exactly what you mean there. I can't tell you the race of the individuals who have been the election judges or who have been the clerks to assist the election judges. No, I can't tell you that. I can't tell you that there have been instances when minority voters have tried to vote and they have been turned away. I can't tell you that.

Q. And that would be true at any time, say, during the 1990s or 2000s. For any given election, that would be true. Right?

A. We haven't conducted a specific investigation in relation to voting irregularities just for that particular MUD.

Q. And because you lack any information about the district's elections, you personally and as representative of the two organizations you represent don't have any complaint about the district's elections. Is that true?

A. Well, I'm not sure what you mean by not having any complaint about the district's elections.

Q. You –

A. We've never filed a complaint about the district's elections, so I can't say that we do. I mean, obviously, I would have loved to have seen more [21] diversity on the people who represent the – the board or members of the board, and so I can't say that I have – I mean, that I appreciate the results.

Q. Does your – do the organizations you represent collect complaints made by individuals about elections or things that happened when they went to the polling place or what have you?

A. Absolutely, we do. You know, we've done that in the past. I know that – I guess one of the problems relating to this – this MUD is that there are so few minorities that actually live within the MUD. But that's one thing we've actively done over the past seven or eight years, is collect information relating to voting irregularities.

Q. To your knowledge, no individual has ever made a complaint to your organization about the way the district's elections have been executed or performed. Is that fair to say?

A. It's – it's – it's fair to say that I'm not familiar with any complaint that has been filed by any citizen relating to how the Northwest Austin MUD, Travis County, handles its elections.

Q. If such a complaint had been filed, you would be likely to be aware of it and – whether in a general sense or in preparation for this deposition, is it not

* * *

[46] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff, v. ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	CIVIL ACTION NO. 1:06-CV-01384 (DST, PLF, EGS)

REPORTER'S CERTIFICATION
DEPOSITION OF GARY BLEDSOE
Monday, February 26, 2007

I, RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, GARY BLEDSOE, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on March 1, 2007 to the witness or to the attorney for

the witness for examination, signature and return to me by _____, 2007.

That the amount of time used by each party at the deposition is as follows:

[47] Mr. Gregory S. Coleman – 33 minutes
Ms. Nina Perales – 0 minutes
Mr. Samuel Spital – 0 minutes
Mr. George Korbel – 0 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Gregory S. Coleman, attorney for Plaintiff

Ms. Nina Perales, attorney for MALDEF

Mr. George Korbel, attorney for Texas Rio Grande Legal Aid, Inc.

Mr. Chris Herren, attorney for USDJ

Mr. Benjamin Blustein, attorney for Lawyers' Committee for Civil Rights Under Law

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 1st day of March, 2007.

RANDALL N. FINCH, Texas CSR #504
Expiration date: 12/31/2008
Fredericks-Carroll Reporting
Firm Registration No. 82
7800 Shoal Creek Blvd., Suite 200-W
Austin, Texas 78757 (512) 477-9911

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701	)	
Plaintiff,	)	CIVIL ACTION NO.
v.	)	1:06-CV-01384 (DST, PLF, EGS)
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITES STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

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ORAL DEPOSITION OF
OFELIA MALDONADO ZAPATA
Wednesday, February 28, 2007

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ORAL DEPOSITION OF OFELIA MALDONADO ZAPATA, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 28th day of February, 2007, from 9:13 a.m. to 9:32 a.m., before RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Weil, Gotshal &

Manges, LLP, 8911 Capital of Texas Highway, Suite 1350, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

[2] APPEARANCES

FOR THE PLAINTIFF NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NO. ONE:

Mr. Gregory S. Coleman
-and-
Mr. Christian J. Ward
WEIL, GOTSHAL & MANGES, LLP
8911 Capital of Texas Highway
Building One, Suite 1350
Austin, Texas 78759 (512) 349-1937
(512) 527-0698 Fax

FOR TEXAS RIO GRANDE LEGAL AID, INC.:

Mr. Jose Garza
Attorney at Law
1111 N. Main Avenue
San Antonio, Texas 78212 (210) 212-3700
(210) 212-3772 Fax

FOR THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION:

Mr. Chris Herren
-and-
Ms. Christy A. McCormick
950 Pennsylvania Avenue, N.W., Room 7246
Washington, D.C. 20530 (202) 305-0609
(202) 327-3961 Fax

EXHIBIT INDEX

PLAINTIFF'S EXHIBITS

12. Fax from the TRLA containing board minutes for the May 23rd, 2006 board meeting 12

[3] OFELIA MALDONADO ZAPATA,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. COLEMAN:

Q. Good morning, Ms. Zapata.

A. Good morning.

Q. Thank you for coming here today. Can you tell me where you live?

A. I live in Austin.

Q. Okay.

A. Texas.

Q. Can you tell me where in Austin you live?

A. I live in southeast Austin.

Q. Okay. Can you give us an address?

A. Yes, it's 5506 Mesquite Grove and the ZIP code is 78744.

Q. You have intervened in the lawsuit. Do you understand what intervene means? You joined the lawsuit?

A. Yes.

Q. Okay. Yes.

A. Yes.

Q. Can you explain for me a little bit about how you came to join this lawsuit.

A. Well, I'm on the board – I'm kind of the [4] representative for Texas Rio Grande Legal Aid and I had conversation with – with Mr. Garza and I asked him if he could represent me.

Q. Okay. How did you learn about this lawsuit?

A. Well, Mr. Garza and I met.

Q. Okay. So – again, Mr. Garza is your attorney, so –

A. Yes.

Q. I don't want to go into specific conversations. But is it – would it be fair to say you learned about the lawsuit from Mr. Garza?

A. Yes.

Q. You don't live in the district, do you? When I say district, I mean the district that has sued the –

A. No.

Q. – filed this lawsuit? Do you know the name of the district?

A. Yes. It's the Northwest Austin MUD.

Q. Do you know where it is?

A. In this part of town.

Q. Okay. I mean, more specifically, do you know?

A. 620 area.

Q. Okay. 620 and –

A. 620 and – well, this area. I just know it's [5] just northwest up this way.

Q. Do you know – have you ever been to the district?

A. I have been to the lake. The lake is in that area. I can – is it –

Q. Which lake are you speaking about?

A. I don't know. It's a lake we went to and I remembered – just about driving up here, it was in this area.

Q. Is it you your understanding –

A. Like Travis, I believe.

Q. Is it your understanding that Lake Travis is in the district or in part of the district?

A. I didn't know it was part of the district, just in the route here. Knowing that I was over there from – I'm assuming it's in the district.

Q. Okay. Other than having been to the lake, do you know if you've ever been inside the district?

A. No.

Q. Okay. You've never voted in an election in the district –

A. No.

Q. – have you?

Do you know anything about how the district is organized?

[6] A. Only that it's – has a board.

Q. Do you know how many members are on that board?

A. I think there was five.

Q. Okay. Have you ever met any of the members of the board?

A. No.

Q. Have you ever met any past members of the board?

A. No.

Q. Do you know anything about how the board or the district conducts elections?

A. No.

Q. Has anybody ever told you anything about how the district conducts elections?

A. In this district – this district? No.

Q. Do you know where the district hold its elections?

A. No. I don't remember. I just read the minutes of the last board where this came about, so, no.

Q. Okay. Would it be safe to say that your involvement in this lawsuit is not based on any complaint about how the district conducts its elections?

[7] A. Yes.

Q. Your involvement in the lawsuit is based solely on the district's desire to exclude itself from preclearance. Is that correct?

A. Preclearance being . . .

Q. Do you know what preclearance is?

A. No.

Q. Let me back up a little bit. Without telling me any particular conversations you've had with your lawyer, can you tell me why you have joined this lawsuit?

A. Well, my involvement in the community is about getting voter turnout in elections. And this

lawsuit interested me because of the intent to exclude Section 5 and that's why I'm – I became interested in this lawsuit.

Q. I think your involvement in the community to increase voter participation is a wonderful thing and I congratulate you on it. And I want to make sure, you don't believe or understand that the district has any different views about encouraging voter participation, do you?

A. I don't know.

Q. Okay. What is your understanding of – when you say exclude Section 5, can you tell me your [8] understanding of what that means?

A. The – the Northwest MUD is – is wanting to eliminate Section 5 and – and I'm against that.

Q. Can you tell me what Section 5 means to you?

A. Section 5 was – was – was created to protect the rights of minorities around disproportionate – disappropriation of voters, and so that's – that's my understanding. And I – I feel and I believe that eliminating Section 5 is – is only going to hurt our community, the community and the minority community that I work with.

Q. Have you ever lived outside of Texas?

A. No.

Q. You've never lived in New Mexico?

A. No.

Q. Or Oklahoma?

A. No.

Q. Do you know whether Section 5 applies in Oklahoma or New Mexico?

A. No. I don't know.

Q. Do you know how Section 5 works?

A. Yes. If the city or the county want to create – for example, if they want to eliminate voting areas in East Austin, and they want to increase them in West Austin, well, the Section 5 – they can't do that [9] because they need to get justification from the Justice Department that that's legal or not. And without Section 5, we wouldn't have that protection.

Q. Is it your understanding that Section 5 is the protection that would prevent an illegal shift of voting polling places?

A. Yes.

Q. Do you know what the term bailout means?

A. No. Other than when a convict bails out. But I don't know.

Q. Do you know whether the Voting Rights Act contains a provision that says if a government entity has obeyed Section 5 for some period of time, it can apply to be let out of Section 5 or to bailout of Section

5. Do you – do you know whether that type of a provision exits or not?

A. No, I don't know about that.

Q. Do you know whether the district is asking for that type of exclusion or not?

A. I understand they are, but my interest is more on Section 5, not so much to bailout.

Q. Do you believe that if a – if a governmental entity does live up to its obligations under the Voting Rights Act and can show that it has obeyed the law for a period of time, and that the statute says if you've

* * *

[14] CHANGES AND CORRECTIONS

WITNESS NAME: OFELIA MALDONADO ZAPATA
DATE: _____

Reason Codes: (1) to clarify the record; (2) to conform to the facts; (3) to correct a transcription error; (4) other (please explain).

PAGE	LINE	CHANGE	REASON CODE

[15] _____
OFELIA MALDONADO ZAPATA

THE STATE OF _____)
)
COUNTY OF _____)

Before me, _____, on this day personally appeared OFELIA MALDONADO ZAPATA, known to me (or proved to me under oath or through

_____

(description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of March 2007.

_____
NOTARY PUBLIC IN AND
FOR THE STATE OF _____

[16] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701	)	CIVIL ACTION NO. 1:06-CV-01384 (DST, PLF, EGS)
Plaintiff,	)	
v.	)	
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

REPORTER'S CERTIFICATION
DEPOSITION OF OFELIA MALDONADO ZAPATA
Wednesday, February 28, 2007

I, RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, OFELIA MALDONADO ZAPATA, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness.

That the deposition transcript was submitted on March 2, 2007 to the witness or to the attorney for

the witness for examination, signature and return to me by _____, 2007.

That the amount of time used by each party at the deposition is as follows:

[17] Mr. Gregory S. Coleman – 19 minutes
Mr. Jose Garza – 0 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Gregory S. Coleman, attorney for Plaintiff

Mr. Jose Garza, attorney for Texas Rio Grande Legal Aid, Inc.

Mr. Chris Herren and Ms. Christy A. McCormick, attorneys for U.S. Department of Justice

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 1st day of March, 2007.

_____

RANDALL N. FINCH, Texas CSR #504
Expiration date: 12/31/2008
Fredericks-Carroll Reporting
Firm Registration No. 82
7800 Shoal Creek Blvd., Suite 200-W
Austin, Texas 78757 (512) 477-9911

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff,	)	CIVIL ACTION NO. 1:06-CV-01384 (DST, PLF, EGS)
v.	)	
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

* *

ORAL DEPOSITION OF
ANGELA GARCIA
Wednesday, February 28, 2007

* *

ORAL DEPOSITION OF ANGELA GARCIA, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 28th day of February, 2007, from 9:33 a.m. to 9:45 a.m., before RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Weil, Gotshal & Manges, LLP, 8911 Capital of Texas Highway, Suite 1350, pursuant to the Federal Rules of Civil Procedure and

the provisions stated on the record or attached hereto.

[2] APPEARANCES

FOR THE PLAINTIFF NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NO. ONE:

Mr. Gregory S. Coleman
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Austin, Texas 78759 (512) 349-1937
(512) 527-0698 Fax

FOR TEXAS RIO GRANDE LEGAL AID, INC.:

Mr. Jose Garza
Attorney at Law
1111 N. Main Avenue
San Antonio, Texas 78212 (210) 212-3700
(210) 212-3772 Fax

FOR THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION:

Mr. Chris Herren
-and-
Ms. Christy A. McCormick
950 Pennsylvania Avenue, N.W., Room 7246
Washington, D.C. 20530 (202) 305-0609
(202) 327-3961 Fax

[3] ANGELA GARCIA,
having been first duly sworn, testified as follows:

EXAMINATION

BY MR. WARD:

Q. Ms. Garcia, thank you very much for coming here today. I am Chris Ward. I represent the district that's the plaintiff in this lawsuit. Do you know the name of the district that's the plaintiff?

A. No. I was going to ask you that. What district?

Q. It's called the Northwest Austin Municipal Utility District or MUD No. 1. And if I – if I refer to the district or the MUD –

A. Okay.

Q. – that's what I'll be referring to. Have you ever been to the district?

A. No, sir.

Q. Do you know where it is?

A. No, sir. I'm from San Antonio.

Q. Okay. Where in San Antonio do you have a –

A. I live in 2731 West Mistletoe 78228.

Q. Okay. And how long have you lived there?

A. 30 years.

Q. Okay. And did you live somewhere else in San Antonio before that?

[4] A. I was born in Gonzalez, Texas.

Q. Okay.

A. And I lived there until I was 19.

Q. Okay. Have you spent time in Austin at all?

A. Oh, yes, I've been here. I – I've been here several times. I – I belong to an organization, the LULAC organization. And so I've been here a lot of times and, of course, with the Legislatures.

Q. Lobbying at the Capitol?

A. Well, talking to the –

Q. Not lobbying but talking –

A. Talking, yes.

Q. So you've – you've had a lot of community involvement?

A. Yes.

Q. And did you do anything to prepare for this deposition today?

A. No.

Q. Okay. Did you bring any documents with you?

A. No.

Q. In response to the notice?

A. No.

Q. Okay. And you have intervened in this lawsuit. Do you understand what it means to be an intervenor?

[5] A. To be part of the case.

Q. And that you're participating essentially as a party in the case?

A. Right.

Q. Okay. Now, without going into the content of any conversations you might have had with your lawyers, can you tell me a little bit about how you came to be in this lawsuit?

A. Well, Mr. Garza, you know, interviewed me to see if I qualified for this and since I do a lot of work with – with Legal Aid on – on certain issues and the Voting Rights Act, I agreed to come, since I am acquainted with a lot of issues pertaining to the Voting Rights Act.

Q. Okay. And what in particular interested you in intervening in this case?

A. Well, of course, Section 5, the protection of Section 5.

Q. And can you tell me what – as you understand it what protections Section 5 provides?

A. Well, I think it's a good process to go through the Department of Justice and that way there's – there's – there's a checkbook there that if something is not – is not presented, then it can go against you or it can go for you. So I think it's – [6] it should be and it should stay as – as it is.

Q. Okay. Do you know if there are other parts of the Voting Rights Act besides Section 5 which require minority voting rights to be protected?

A. Well, yes, Section 2, of course. I mean, of course, I just learned today about the bailout.

Q. Okay.

A. I wasn't aware of it.

Q. And, you know, after – after listening today you understand that bailout permits a community that might be covered by Section 5 to get out of the Section 5 preclearance process. Do you understand that?

A. Right. I understood the lawsuit.

Q. And do you understand that even if the community does that, it is still under Section 2, it has to comply with Section 2?

A. Right. I understand – do understand that. The only thing is my opinion is that I – you know, the – the fact remains is – the State of Texas has a very bad record of – of – in that section, so that's one of the reasons that we – that was created, Section 5 or Section 2, so I think it should stay.

Q. So –

A. And if you bail out, well, it should provide it, because it's in there. But then, you know, that's [7] why it's been challenged.

Q. Okay. So – so you think that in Texas, generally, there's a history –

A. Of course, I'm a Texan. I know what's going on in Texas and, of course, nationally there's other problems, too, but . . .

Q. If a – if a particular community in Texas that were able to show that in that one community they had a history of complying with Section 2 and the Voting Rights Act, would you be opposed to that particular community bailing out, even if the rest of the state remains covered?

A. I don't think I would be opposed, but I don't think you could ever show me a community that has done a good job. So that's my opinion.

Q. Okay. And you've – you said you'd never been in the district, so I guess it's fair to say you've never voted in the district?

A. No, I have never voted in this district.

Q. And do you know anyone who lives there that you know of?

A. No, not really. I would have to – no, I know a lot of people in Austin, but most of them live in the

south part of Austin. But I imagine I – I would know someone. I know a lot of people, but, no, I don't.

[8] Q. Okay. So you might know someone, but you don't know –

A. Right,

Q. – that they live in the district?

A. Right.

Q. So you don't – you're not complaining of any particular problems with voting –

A. Not in your district.

Q. – in the district?

A. Not in your district. I can give testimony in other districts.

Q. Okay. And do you know anything about the district's views on participation by voters in the district?

A. No, sir. No, sir. I don't.

Q. Okay. And what – what is your understanding of what the district is trying to do in this lawsuit?

A. Well, I think that the district is seeking not to go through preclearance, and like in Section 5 and so that's the reason that I think it's being challenged.

Q. Okay. So you understand that the district is asking for bailout for itself?

A. Right. Right.

Q. And that the district would stay –

[9] A. And it would be a very dangerous precedent for the community.

Q. Okay.

A. And that's my opinion.

Q. Okay. Why do you think it would be dangerous?

A. Because then, you know, you set a precedence and anybody else can use it all over the nation.

Q. Okay. But you also understand that the district, if it were able to bail out, would still be covered by Section 2?

A. Oh, yeah.

Q. And the rest of the Voting Rights Act?

A. I do.

Q. Can we go off the record?

(Discussion off the record)

Q. (By Mr. Ward) Okay. We can go back on. Do you know if any other communities around the country have ever bailed out?

A. No, sir.

Q. Okay.

A. I've done a – I've gone with other communities that's gone to Section 5 and been very successful. I can give testimony to that.

Q. So you've – you've participated in the Section 5 process for other communities?

* * *

[14] PAGE LINE CHANGE REASON CODE

_____

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_____
ANGELA GARCIA

THE STATE OF _____)
)
COUNTY OF _____)

Before me, _____, on this day personally appeared ANGELA GARCIA, known to me (or proved to me under oath or through

_____

(description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of March 2007.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF _____

[15] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff,	)	CIVIL ACTION NO.
v.	)	1:06-CV-01384 (DST,PLF,EGS)
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

REPORTER'S CERTIFICATION
DEPOSITION OF ANGELA GARCIA
Wednesday, February 28, 2007

I, RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, ANGELA GARCIA, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness.

That the deposition transcript was submitted on March 2, 2007 to the witness or to the attorney for the witness for examination, signature and return to me by _____, 2007.

That the amount of time used by each party at the deposition is as follows:

[16] Mr. Christian J. Ward – 12 minutes
Mr. Jose Garza – 0 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Christian J. Ward, attorney for Plaintiff

Mr. Jose Garza, attorney for Texas Rio Grande Legal Aid, Inc.

Mr. Chris Herren and Ms. Christy A. McCormick, attorneys for U.S. Department of Justice

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 1st day of March, 2007.

RANDALL N. FINCH, Texas CSR #504
Expiration date: 12/31/2008
Fredericks-Carroll Reporting
Firm Registration No. 82
7800 Shoal Creek Blvd., Suite 200-W
Austin, Texas 78757 (512) 477-9911

---

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff,	)	CIVIL ACTION NO. 1:06-CV-01384 (DST, PLF, EGS)
v.	)	
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

* *

ORAL DEPOSITION OF
DAVID DIAZ
Wednesday, February 28, 2007

* *

ORAL DEPOSITION OF DAVID DIAZ, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 28th day of February, 2007, from 1:37 p.m. to 2:11 p.m., before RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Weil, Gotshal & Manges, LLP, 8911 Capital of Texas Highway, Suite 1350, Austin, Texas 78759, pursuant to the Federal Rules of Civil

Procedure and the provisions stated on the record or attached hereto.

[2] APPEARANCES

FOR THE PLAINTIFF NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NO. ONE:

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-and-
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[3] Mr. Daniel A. Zibel (By telephone)
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FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.:

Mr. Debo P. Adegbile (By telephone)
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[4] DAVID DIAZ,
having been first duly sworn, testified as follows:

EXAMINATION

BY MR. COLEMAN:

Q. Good afternoon. I'm Greg Coleman. I represent the district in this litigation. Would you explain for the court reporter your name – full name and address.

A. David Alan Diaz. 10424 Ember Glen Drive, Austin, Texas 78726.

Q. Thank you for being here this afternoon. How long have you lived in the district?

A. 13 years.

Q. That would make you one of the earlier residents of the district, wouldn't it?

A. The neighborhood is a little older than that. I think it's about 10 years older than that.

Q. Okay. Have you lived in the same house –

A. Yes.

Q. – the entire time? Where did you move from?

A. We were in an apartment off of Shepherd Mountain for a year before that.

Q. Okay.

A. Here in Austin.

Q. And before that?

[5] A. We lived for three years in Pueblo, Colorado.

Q. Okay. And before that?

A. We were in Dallas – or I was in Dallas for four years before that.

Q. Okay. And before that?

A. Indiana, going to college for four years.

Q. Okay. And where did you grow up?

A. In Albuquerque, New Mexico.

Q. All right. Would you consider yourself to be fairly involved in the community?

A. Could you define involved?

Q. I was actually going to ask you, if you said yes, to define – tell me a little bit about what you do. What sorts of activities do you do in the community?

A. In Canyon Creek?

Q. Anywhere. In –

A. Anywhere? We're involved in a local church community, but otherwise, Canyon Creek is where I live and raise my children.

Q. What church community are you involved in?

A. St. Thomas More.

Q. Are you involved in any nonprofit organizations?

A. No.

* * *

[10] Q. Do you know any other members of the board?

A. No.

Q. If I gave you names would you recognize any of them?

A. I'd probably recognize names.

Q. Bill Ferguson?

A. I know the name.

Q. Have you met Mr. Ferguson?

A. I believe he was at the MUD meeting that I went to, but I did not personally meet him.

Q. Have you met or know him outside of that MUD meeting at all?

A. No.

Q. Ed Swarthout?

A. I know the name, but I'm not –

Q. Same question, have you met or talked to him outside that one meeting?

A. No.

Q. George Frederickson?

A. No.

Q. Alan Wiese?

A. No.

Q. Karen Timborius?

A. No.

SPEAKER: Join.

[11] MR. COLEMAN: Who's joining?

MR. BLUSTEIN: Hi, its Ben.

MR. COLEMAN: Okay. Hey, Ben. We're underway here with Dr. Diaz.

Q. (By Mr. Coleman) Let me ask you a little about how you came to be involved in the litigation. I think you mentioned that you attended the district meeting after you had intervened in the lawsuit.

A. Correct.

Q. Were you contacted by individuals about possibly intervening in this – this suit?

A. Yes.

Q. Did they call you on the phone, come to your door? Can you tell me how they contacted you?

A. Came to my door.

Q. Did you know these individuals before that time?

A. No.

Q. Do you recall the names of the individuals who came to your door?

A. Unfortunately, no.

Q. Okay. Which may answer my next question: Did – did you know or have any relationship with these individuals before that?

A. No.

[12] Q. Do you know, were these individuals attorneys?

A. Yes.

Q. Without disclosing the content of any of your discussions, you had a conversation with them at your home? One or –

A. They came to my front door.

Q. Okay. How many conversations did you have before you decided to join the lawsuit?

A. Two, I believe.

Q. And both in person?

A. Yes.

Q. Let me ask you in your own words why you intervened in this lawsuit.

A. I am concerned about an attack on the Voting Rights Act in the United States.

Q. When you say the Voting Rights Act, do you understand that this lawsuit only involves one particular section of the Voting Rights Act?

A. Yes.

Q. And you – do you understand that to be what we call alternatively Section 5 or the preclearance provisions?

A. Yes.

Q. Do you understand what preclearance is?

A. I believe so.

[13] Q. Can you describe for me just briefly what your understanding of preclearance is?

MS. PERALES: Objection to the extent that it calls for legal knowledge.

Q. (By Mr. Coleman) Just your understanding.

A. My understanding is that there are regulations involving the change of a voting location.

Q. And is it your belief that the district has improperly moved a voting location?

A. I don't believe – or I don't think that anything has been improperly moved.

Q. Okay. How does your understanding of, you know, what we're calling Section 5 or preclearance link to voting locations?

MS. PERALES: Objection; vague.

Q. (By Mr. Coleman) Just your – what you understand.

MS. PERALES: You can answer.

THE WITNESS: By my understanding, if there is to be a change of an election location, a letter must be filed with the Department of Justice to change that voting location.

Q. (By Mr. Coleman) Okay. And it's – and that's your understanding of preclearance, is that there's a submission asking permission?

[14] A. That is my understanding.

Q. Okay. Let me go back. You had indicated that you have voted in a number of state, federal and local elections over the years. You are – and I just want to be clear: You are not here complaining about the way any particular election was operated or run, are you?

A. No.

Q. Whenever you have chosen to exercise your right to vote, you have been able to exercise that in full –

A. Correct.

Q. – have you not?

In connection with the – with the district itself, you've not suffered any form of discrimination or anything like that in exercising your right to vote, have you?

A. No.

Q. Would it be safe to say that because you are not here to – or your presence in the lawsuit is not to suggest any propriety in the elections themself, but that you have a strong philosophical objection to the district's seeking of a bailout or challenge to Section 5. Is that –

A. Could you repeat the question, please.

[15] Q. Yeah, it's too long. We established – you're not complaining about the way elections have been run.

A. Correct.

Q. What you are complaining about is the district's decision to try to exclude itself from the preclearance framework. You don't want the district to remove itself from the preclearance obligations.

A. Correct.

Q. Do you understand what the term bailout means?

MS. PERALES: Objection to the extent that it calls for legal knowledge.

Q. (By Mr. Coleman) Just if – if you have an understanding.

A. Not a good understanding.

Q. Let – without going into a great deal of detail, let me represent to you that there's a provision in the Voting Rights Act that allows certain governmental entities to demonstrate that they have lived up to their obligations under the Voting Rights Act for a period of years and that when it does so, it then obtains the right to be exempted from preclearance in the future. If the district could show that it has done that, would you object to it exempting itself from preclearance under the statute?

MS. PERALES: Objection to the extent [16] that it calls for legal knowledge or legal conclusions regarding bailout.

THE WITNESS: Could you rephrase? I'm . . .

Q. (By Mr. Coleman) I'm not asking you to agree with me what the statute says, but if you will just agree with me or assume for the moment that there is a statutory provision that allows some governmental entities to say, "We have – we have fulfilled our obligations under the Voting Rights Act for a period of years," and that if you show that, then the statute will exempt you from preclearance. Will you assume that with me for a moment? That there's an exemption procedure under the statute?

A. Okay.

Q. If the district were to demonstrate that it could fall – that it could satisfy that – that statutory exemption, would you still object to it doing that?

MS. PERALES: Objection; speculative. You may answer.

THE WITNESS: If it follows current regulations?

Q. (By Mr. Coleman) If it shows that it has followed regulations.

A. If it follows the regulations as written?

[17] Q. Yes.

A. I guess, if it follows current regulations.

Q. Based – and based on our discussion thus far, you don't have any reason to believe that the district hasn't followed the requirements of the Voting Rights Act, do you?

A. No.

MS. PERALES: Objection; it calls for a legal evaluation and conclusion regarding the district's compliance with the Voting Rights Act.

Q. (By Mr. Coleman) But your answer was no. Right?

A. I'm not sure.

MS. PERALES: I think we were talking over each other, just to make the record clear.

Q. (By Mr. Coleman) My question, Dr. Diaz, wasn't necessarily a conclusion. I think what I said was you don't have any reason to believe that it hasn't. Nothing in your experience leads you to believe that the district hasn't fulfilled its obligations under the Voting Rights Act.

MS. PERALES: Objection to the extent that it calls for a legal conclusion regarding whether or not the district has fulfilled its obligations under the Voting Rights Act.

* * *

[22] waiting.

A. Repeat it again, please.

MS. PERALES: You can take your time with the thinking, too, if you need to.

MR. COLEMAN: Yes. Absolutely.

Q. (By Mr. Coleman) Are there any circumstances under which you would agree that the district should be exempted from preclearance?

MS. PERALES: And same objection.

THE WITNESS: No.

Q. (By Mr. Coleman) Dr. Diaz, did you bring any documents today in response to the deposition notice that you received?

A. No.

MR. COLEMAN: I'll pass the witness.

MS. PERALES: I have no questions. Anybody on the phone have questions?

MR. KORBEL: No questions.

MR. BLUSTEIN: No questions.

(Deposition concluded at 2:11 p.m.)

[23] CHANGES AND CORRECTIONS

WITNESS NAME: DAVID DIAZ DATE: _____

Reason Codes: (1) to clarify the record; (2) to conform to the facts; (3) to correct a transcription error; (4) other (please explain).

PAGE	LINE	CHANGE	REASON CODE

_____

[24] DAVID DIAZ

THE STATE OF _____)
)
COUNTY OF _____)

Before me, _____, on this day personally appeared DAVID DIAZ, known to me (or proved to me under oath or through

_____

(description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of March 2007.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF _____

[25] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff,	)	CIVIL ACTION NO.
v.	)	1:06-CV-01384 (DST,PLF,EGS)
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

REPORTER'S CERTIFICATION
DEPOSITION OF DAVID DIAZ
Wednesday, February 28, 200[illegible]

I, RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, DAVID DIAZ, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness.

That the deposition transcript was submitted on March 3, 2007 to the witness or to the attorney for the witness for examination, signature and return to me by _____, 2007.

That the amount of time used by each party at the deposition is as follows:

[26] Mr. Gregory S. Coleman – 00 minutes
Ms. Nina Perales – 0 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Gregory S. Coleman and Mr. Christian J. Ward, attorneys for Plaintiff

Ms. Nina Perales, attorney for MALDEF

Mr. George Korbel, attorney for Texas Rio Grande Legal Aid, Inc.

Mr. Chris Herren and Ms. Christy A. McCormick, attorneys for U.S. Department of Justice

Mr. Benjamin Blustein and Mr. Daniel A. Zibel, attorneys for Lawyers' Committee for Civil Rights Under

Mr. Max Renea Hicks, attorney for Travis County

Mr. Debo Adegbile, attorney for the NAACP Legal Defense and Educational Fund, Inc.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 28th day of February, 2007.

[27]_____

RANDALL N. FINCH, Texas CSR #504
Expiration date: 12/31/2008
Fredericks-Carroll Reporting
Firm Registration No. 82
7800 Shoal Creek Blvd., Suite 200-W
Austin, Texas 78757 (512) 477-9911

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff, v. ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	CIVIL ACTION NO. 1:06-CV-01384 (DST, PLF, EGS)

* *

ORAL DEPOSITION OF
LISA DIAZ
Wednesday, February 28, 2007

* *

ORAL DEPOSITION OF LISA DIAZ, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 28th day of February, 2007, from 2:19 p.m. to 2:46 p.m., before RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Weil, Gotshal & Manges, LLP, 8911 Capital of Texas Highway, Suite 1350, Austin, Texas

78759, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

[2] APPEARANCES

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-and-
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[4] LISA DIAZ,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. WARD:

Q. Mrs. Diaz, thank you for coming here today. As I introduced myself to you earlier, I am Chris Ward here representing Northwest Austin MUD No. 1, which for the record I'll refer to as the district or the MUD.

A. Okay.

Q. Throughout the deposition. For the record, will you please state your full name and address.

A. Lisa Acevedo Diaz. And I live – live at 10424 Ember Glen Drive, Austin, Texas 78726.

Q. And how long have you lived at that address?

A. It will be 13 years in May.

Q. Okay. And Dr. Diaz, David Diaz, is your husband?

A. Yes, sir.

Q. So you all moved into the district, into that house, at the same time?

A. Yes.

Q. And before that were you also living with him in Austin but outside the district?

A. Yes.

Q. Okay. And where did you live before that?

[5] Before – before –

A. Before Austin?

Q. Before Austin. Right.

A. We lived in Pueblo, Colorado.

Q. Okay. And – and did you live in Dallas with him or –

A. Not with him, no, but –

Q. Like he did before?

A. – I did live in Dallas.

Q. Okay. Okay. I'm just . . . And where did you live before you lived in Dallas?

A. It was – well, a short while in San Antonio. Want me to keep going back?

Q. Okay. I think that's fine.

A. Okay.

Q. I think that's far enough. Did you bring any documents today?

A. No, sir.

Q. Okay. Did you do anything to prepare for the deposition today?

A. I – not today.

Q. Oh – well, have you done anything to prepare for this deposition?

A. Just making sure I – I understood the preclearance section.

* * *

[14] Q. You understand that?

A. I think I understand what you're saying.

Q. Okay. And – and that – do you understand that in the district's lawsuit, if the court says the

district can have that bailout, that that's the end of the lawsuit?

MS. PERALES: Objection; calls for a legal conclusion.

Q. (By Mr. Ward) Okay, is – is that a no answer? You shook your head. Is that – the – the reporter needs you to say yes or no.

A. Would you repeat it one more time? Sorry.

Q. Okay. Basically – let me try to rephrase it a little bit. And I am – I just want to make clear I know you're not a lawyer and you're not answering this as a lawyer, so the question is just do you understand what I'm about to say, that the district is asking for bailout and if the court says, "District, you are allowed to bail out," then that's the end of the lawsuit? That's –

A. Okay.

Q. That's all the district wants. If it gets it, the lawsuit ends.

MS. PERALES: Same objection. You may answer.

[15] THE WITNESS: Okay.

Q. (By Mr. Ward) Okay. Did that –

A. I – I understand what you are saying, yes.

Q. Okay. Do you understand that Section 5, the preclearance section, is one section of the Voting

Rights Act and that there are other sections of the Voting Rights Act that do different things?

A. To a certain extent, yes.

Q. Okay. And do you understand that the rest of the Voting Rights Act is what forbids local districts to discriminate against people in voting?

A. Repeat that. The rest . . .

Q. Do you understand that the – that Section 5, preclearance, is just the part which says that a district has to submit something to the Department of Justice, but the rest of the Voting Rights Act is what makes it illegal for a district to discriminate against people when they're voting?

MS. PERALES: Objection to the extent that it mischaracterizes Section 5 and the rest of the Voting Rights Act. You may answer.

THE WITNESS: From what I remember reading, though, the – Section 5 protects people from being discriminated against as well.

Q. (By Mr. Ward) Okay. But do you – do you [16] understand that if a district is – any district is not covered by Section 5, that it still is illegal for that district to discriminate?

A. Yes.

Q. Okay. Do you know if there are parts of the United States that are not covered by Section 5?

A. I don't know which states.

Q. Okay. But you know that there are parts of the United States that are not covered.

A. Yes.

Q. Without – without having to name the specific ones.

A. (Nods head)

Q. Okay. Do you know if that's most states or a minority of states?

A. I don't know.

Q. Okay. Do you believe that the district has improperly made any change affecting voting?

A. Not that I'm aware of.

Q. Okay. And when you voted in the May 2006 district election, did you have any problem going to vote in that election?

A. No, sir.

Q. Okay. So you're not making any complaint here about the conduct of any particular election in the [17] district. Is that correct?

A. That's correct.

Q. Okay. So your interest here is primarily philosophically you want to protect Section 5. Is that correct?

A. Yes, sir.

Q. Back a little bit to the bailout procedure. If a community – I am going to start over because this – this may draw a legal conclusion objection from your counsel if I go the way I started.

MR. COLEMAN: Can't imagine that.

Q. (By Mr. Ward) If I say there – would you allow me to say to you that the bailout procedure which we talked about requires the community to show that it meets certain requirements?

A. Okay.

Q. Okay. Without – without expecting you to have legal knowledge of what those specific requirements are. Can we – would you allow me to say to you that in general, the requirements are, "We've behaved fine for a period of years. We've complied with the Voting Rights Act and with Section 5"? That –

A. Okay.

Q. And if a local community can satisfy those

* * *

[22] CHANGES AND CORRECTIONS

WITNESS NAME: LISA DIAZ DATE: _____

Reason Codes: (1) to clarify the record; (2) to conform to the facts; (3) to correct a transcription error; (4) other (please explain).

PAGE LINE CHANGE REASON CODE

[23] _____
LISA DIAZ

THE STATE OF _____)
)
COUNTY OF _____)

Before me, _____, on this day personally appeared LISA DIAZ, known to me (or proved to me under oath or through

_____

(description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of March 2007.

_____
NOTARY PUBLIC IN AND
FOR THE STATE OF _____

[24] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff, v. ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	CIVIL ACTION NO. 1:06-CV-01384 (DST, PLF, EGS)

REPORTER'S CERTIFICATION
DEPOSITION OF LISA DIAZ
Wednesday, February 28, 2007

I, RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, LISA DIAZ, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on March 3, 2007 to the witness or to the attorney for

the witness for examination, signature and return to me by _____, 2007.

That the amount of time used by each party at the deposition is as follows:

[25] Mr. Christian J. Ward – 00 minutes
Ms. Nina Perales – 0 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Christian J. Ward and Mr. Gregory S. Coleman, attorneys for Plaintiff

Ms. Nina Perales, attorney for MALDEF

Mr. George Korbel, attorney for Texas Rio Grande Legal Aid, Inc.

Mr. Chris Herren and Ms. Christy A. McCormick, attorneys for U.S. Department of Justice

Mr. Benjamin Blustein and Mr. Daniel A. Zibel, attorneys for Lawyers' Committee for Civil Rights Under

Mr. Max Renea Hicks, attorney for Travis County

Mr. Debo Adegbile, attorney for the NAACP Legal Defense and Educational Fund, Inc.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was

taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 28th day of February, 2007.

[26] _____
RANDALL N. FINCH, Texas CSR #504
Expiration date: 12/31/2008
Fredericks-Carroll Reporting
Firm Registration No. 82
7800 Shoal Creek Blvd., Suite 200-W
Austin, Texas 78757 (512) 477-9911

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN
MUNICIPAL UTILITY
DISTRICT NUMBER ONE,
401 W. 15th Street, Suite 850
Austin, Texas 78701,

Plaintiff,

vs.

Civil Action No.
1:06-CV-01384

ALBERTO GONZALES,
ATTORNEY GENERAL
OF THE UNITED STATES,
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530,

Defendant /

The deposition of RODNEY LOUIS was held on Thursday, March 1st, 2007, commencing at 9:00 a.m. at the Law Offices of Weil, Gotshal, & Manges, LLP, 1300 Eye Street, N.W., Suite 900, Washington, D.C., before Steven Poulakos, Notary Public.

REPORTED BY: Steven Poulakos

[2] APPEARANCES:

On behalf of Plaintiff:

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On behalf of The Lewis':

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samuel.spital@hklaw.com

[3] On behalf of Intervenors:

KRISTEN CLARKE, ESQUIRE LDF
1444 Eye Street, N.W.
10th Floor
Washington, D.C. 20005
202-682-1300

BY TELEPHONIC COMMUNICATION:

On behalf of Defendant:

RICHARD DELLHEIM, ESQUIRE
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
richard.dellheim@usdoj.gov

[4] Whereupon,

RODNEY LOUIS,

called as a witness, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION BY MR. COLEMAN:

Q Good morning, Mr. Lewis. My name is Greg Coleman. I represent the Plaintiff in this lawsuit.

You live in the district, and by district I mean Northwest, Austin, MUD number one?

A Yes.

Q How long have you lived there?

A Since 1998.

Q Can you tell us your address there?

A 10613 Brambelcrest Drive, Austin 78726.

Q Where did you live before moving into the district?

A In California.

Q Where in California?

A San Jose, California.

Q How long did you live in San Jose?

[5] A About six years.

Q Before that?

A Prior to that two years in Colorado.

Q Where in Colorado?

A Springs Colorado, Springs.

Q Before that?

A Prior to that I was in school for four years in Baton Rouge.

Q Where did you grew up?

A Area New Orleans area.

Q Would you consider yourself to be involved in the community?

A Somewhat, yes.

Q Can you tell for me – tell me what your involvement has been over the past several years? What kinds of things that you've been involved with?

A In terms of the community, I was heavily involved in our church community, participated in the homeowners' association as well as the MUD.

Q What church community are you active with?

A Holy Cross Catholic Church.

* * *

[22] about it?

A Well, he was pretty vocal about his position and wanting to do everything he could to eliminate

that. So a lot of people supported and shared his thoughts and his vision, if you will.

So I expressed to him that, you know, whatever I can do to help in this effort to let me know, and that's how that start.

Q So on that issue you agree with the position Mr. Zimmerman was espousing trying to get rid of this double taxation?

A Yes, on that issue.

Q Do you have other conversations with Mr. Zimmerman subsequent to the HOA meeting?

A Regarding the double taxation?

Q Regarding anything.

A The only time I've ever talked to him was regarding things that he was doing, and perhaps he wanted to see if I can help him regarding the double taxation.

Q Did you have numerous conversations about [23] that? Would you describe it more as a handful or a lot of conversations over the years?

A More of a light handful. He would tell me what's going on. He would send me e-mails. We didn't speak in person that much, but when we saw each other we spoke either at a meeting, but that's it.

As a matter of fact, I don't remember seeing him too much around the neighborhood, but when we did see each other we spoke about it.

Q I'm sorry. I wanted to clarify something.

When he ran for that house district he asked for your support and you agreed to put up a sign?

A He didn't ask for my support. He asked would I be able to allow him to put a sign up in my yard and I told him absolutely.

I was in meetings, and then when he realized that he was running against Mark Stroma then I obviously I changed my mind.

Q Was the decision not necessarily that you disagreed with Mr. Zimmerman, but that you preferred Mr. Stroma as a candidate?

[24] A That's right.

Q Mr. Stroma, he's still the representative there, right?

A Yes.

Q Is Mr. Stroma doing a good job, do you think?

A As far as I know.

Q When the depo is over I'll tell you what he did for us in the last legislative session.

Going back to what I believe was probably that 2002 election, the election where you voted in two different places?

A Yes.

Q One was in a garage. Was the other one at the elementary school?

A Yes, sir, in the trailer.

Q I'm sorry, in a trailer?

A Yes. The polls were in the trailer at the school.

Q At the school?

A Yes.

[25] Q Did you vote at the garage first and then at the school or the school and then?

A School then garage.

Q Was it very far between the school and the garage?

A It was between the school and my home.

Q You didn't have a problem voting in either of those elections that year?

A No.

Q The next time around when everything was combined at the school, did you find that more convenient?

A Yes. It was more convenient, yes.

Q Did you consider that to be a good change?

A That was a good change.

Q In the time that you've lived in the district, you've always been able to exercise your vote when you've chosen to and wanted to; is that correct?

A That's right.

Q You've never had any problem voting or exercising your vote to choose the candidates that you [26] want; is that correct?

A That's correct except the last absentee ballots that I didn't get in time.

Q And that was in the –

A The last.

Q 2006 Congressional?

A Yes.

Q Do you recall who you submitted the request for the absentee ballot to?

A It was to – I called the district and they told me who to send it to, but I don't recall exactly who it was; but they sent me the paperwork and I sent it back to them, and I did receive the ballot, just didn't get it in time.

Q When you say you called the district, that was the Congressional elections in the fall, right, the county?

A What do you call it? The voting commission.

Q Voter registrar for the county or the state?

[27] A I don't recall exactly who it was. I don't recall exactly who I requested it, but again, I did get it. I got it a couple of days after. I actually got it a couple of days after.

Q I just wanted to clarify. When you say the district, it's not the MUD?

A No, absolutely not the MUD. No, I'm sorry.

Q Let me talk to you a little bit about your involvement in this particular lawsuit.

A Okay.

Q Would you describe for me, just in your own words, why you've joined this lawsuit as an intervenor?

A I joined because it appears as if this is a request to have the Voters Right Act, the guidelines that's issued by the courts for the Voters Right Act, to be I guess set aside to where the MUD is saying that they, I guess, don't want to follow the guidelines or feel as if it's not necessary, or whatever the feeling is, to follow the guidelines as it relates to the Voters Right Act, and I don't support that.

Q Let me ask for some clarification on your [28] feelings on that.

Do you understand what the term pre-clearance means?

A No.

Q Do you know what section 5 is?

A Of what?

Q I'm sorry, section 5 of the Voting Rights Act.

A No.

Q Let me come back to that.

Tell me a little bit about how you came to be involved. At some point in the process were you contacted by individuals?

A Yes.

Q Did they call you on the telephone or come to your home?

A Phone.

Q Do you know if the individuals you spoke to were attorneys?

A Yes.

Q Were the attorneys for the – were they [29] individuals in the room?

A Ms. Kristen, yes.

Q How many conversations did you have?

MR. SPITAL: Let me interrupt for a second. I believe that you can answer Mr. Coleman's question, but I just want to remind you the nature of any communications you had with your attorneys are confidential and privileged.

BY MR. COLEMAN:

Q I want to respect that. I'm not going to ask you anything that was said between you and your attorneys, but I just wanted to get some basic information.

How many conversations would you say you had prior to your decision to join the lawsuit?

A Prior to my decision?

Q Yes.

A One.

Q Were both you and your wife on that phone call together?

A Initially, no.

* * *

[38] witness. Any questions from DOJ?

MR. DELLHEIM: No questions. Thank you.

MR. SPITAL: We don't have any questions.

(Reading and signature not waived.)

(Whereupon, at 10:00 a.m., deposition was adjourned.)

---

[39] CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

_____

RODNEY LOUIS

---

[40] CERTIFICATE OF SHORTHAND REPORTER – NOTARY PUBLIC

I, Steven Poulakos, registered Professional Reporter, the officer before whom the foregoing proceedings were taken, do hereby certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my supervision; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 6th day of March, 2007.

STEVEN POULAKOS
Notary Public

My commission expires:
June 17, 2009

[41] INDEX

Deposition of RODNEY LOUIS
March 1, 2007

EXAMINATION BY: Page

Mr. Coleman.....4

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN
MUNICIPAL UTILITY
DISTRICT NUMBER ONE,
401 W. 15th Street, Suite 850
Austin, Texas 78701

Plaintiff

vs.

Civil Action No.
1:06-CV-01384

ALBERTO GONZALES,
ATTORNEY GENERAL
OF THE UNITES STATES,
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530,

Defendant /

The deposition of NICOLE LOUIS was held on Thursday, March 1st, 2007, commencing at 10:10 a.m. at the Law Offices of Weil, Gotshal, & Manges, LLP, 1300 Eye Street, N.W., Suite 900, Washington, D.C., before Steven Poulakos, Notary Public.

REPORTED BY: Steven Poulakos

[2] APPEARANCES:

On behalf of Plaintiff:

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On behalf of The Lewis':

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[3] On behalf of Intervenors:

KRISTEN CLARKE, ESQUIRE
LDF
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10th Floor
Washington, D.C. 20005
202-682-1300

BY TELEPHONIC COMMUNICATION:

On behalf of Defendant:

RICHARD DELLHEIM, ESQUIRE
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
richard.dellheim@usdoj.gov

[4] Whereupon,

NICOLE LOUIS,

called as a witness, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION BY MR. COLEMAN:

Q Good morning, Ms. Louis. How are you?

A Good morning.

Q Thank you for taking time out of your schedule to come down today.

You live inside the Northwest Austin Municipal Utility District Number One; is that correct?

A That is.

Q Your husband gave your address. How long have you been all been married?

A We've been married, it will be ten years in on September the 27th of this year.

Q I asked your husband to kind of walk through some of the places you've lived. Mr. Louis testified that you've lived in the district since about I believe June of 1998.

[5] Does that sound about right?

A Yes, that is correct.

Q And before that San Jose, California?

A Yes.

Q Before that Colorado Springs?

A Right. At that time Rodney lived – those cities that he's mentioning is where he lived. I did not live in those cities. At the time we were not married.

Q That's actually what I was trying to get is where the paths diverge and go back.

Where did you live before?

A Prior to living in Austin I lived in Louisiana.

Q Where in Louisiana?

A Mararo, which is a city about 10 to 15 miles outside of New Orleans.

Q Before that?

A That's it.

Q That's where you grew up?

A I grew up right pretty much a suburb of New

* * *

[14] Q Have you done some independent research by yourself or read up on section 5 of the Voting Rights Act, read things about how that preclearance section works?

A No, I have not, not recently.

Q Can you tell me, is it consistent with your understanding that the district is only seeking to

exclude itself from this reporting requirement, what I call section 5?

MR. SPITAL: Objection, calls for a legal conclusion.

You can answer.

THE WITNESS: Could you repeat the question, please?

BY MR. COLEMAN:

Q Let me back up.

The Voting Rights Act, you'll agree with me, has a lot of different things in it?

A Exactly.

Q And most of them, most of the provisions say you can't discriminate in elections, you can't [15] discriminate in campaigning and things like that.

Do you understand that there are a lot of things like that in Voting Rights Act?

MR. SPITAL: For purposes of clarification, this is your description of the Voting Rights Act?

MR. COLEMAN: That's fine. I'm just asking if the witness understands that there's a lot of things like that in the Voting Rights Act.

THE WITNESS: Yes.

BY MR. COLEMAN:

Q Do you understand that the district's lawsuit doesn't try to exempt itself from any of those provisions, but only from the reporting requirement to the Department of Justice?

MR. SPITAL: Objection, calls for a legal conclusion.

THE WITNESS: I am aware of that.

BY MR. COLEMAN:

Q That's consistent with your understanding of the lawsuit?

A Yes.

[16] Q And your decision to join the lawsuit, is it correct that it is based on your feeling that the district should not be exempted from the reporting requirement?

A Right.

Q What I call pre-clearance?

A Exactly.

Q Are there other reasons that you have joined the lawsuit or is that the primary or only reason?

A That's the primary reason.

Q And to be more specific, in joining the lawsuit you are not bringing any complaint about the way the district has performed its elections in 2006 or 2004 or

any of the other previous elections that it has held for its board members; is that correct?

A No, I don't have any complaints.

Q Do you know whether the statute has a provision in it that allows some governmental entities to show that they have followed the provisions of the Voting Rights Act for a period of years and that if [17] they could show that then they could exclude themselves from the pre-clearance requirement?

Do you know whether there's anything like that in the Voting Rights Act?

A I'm not sure. I'm not an attorney, so.

Q I'm going to ask you just for a moment to assume that there is something like that in the Voting Rights Act.

If the district could show that it fits within that statute, would you still oppose them seeking to exclude themselves from pre-clearance?

MR. SPITAL: Just to clarify. Are you asking Ms. Louis to assume that the district is eligible?

MR. COLEMAN: No. I'm just saying if.

MR. SPITAL: If the district were eligible?

MR. COLEMAN: If the district could fit itself within that, would she still oppose the district asking to be excluded from pre-clearance?

MR. SPITAL: By that you mean the provisions of the Voting Rights Act that you referred [18] to previously?

MR. COLEMAN: From pre-clearance.

THE WITNESS: Yes, I would still oppose it.

BY MR. COLEMAN:

Q Can you tell me why you would still oppose it even in those circumstances?

A I feel as though even though they would I guess meet those standards, I still feel as though as a citizen you would still be responsible to inform me of any changes or make any changes known, and I hope I'm clear on that.

Q I think so.

Let me ask you one question about that.

Do you believe that informing the residents of possible changes is the same as or different from its obligation to ask for pre-clearance from the Department of Justice?

MR. SPITAL: Objection, calls for legal conclusion.

BY MR. COLEMAN:

Q I'm sorry, I didn't hear you.

[19] A I'm not a lawyer, but I don't believe it's the same. I think it's different.

Q If the district had a policy of making sure that all of the residents knew about any changes that were being made and then could fit itself under that statute, would you be opposed to the district seeking to exclude itself from the pre-clearance requirements as long as it made sure that all of the residents were aware of any changes that were being made?

MR. SPITAL: For clarification purposes, you said it fit the statutory criteria for bailout.

MR. COLEMAN: For bailout, I'm sorry.

THE WITNESS: I don't think I would have a problem if they were to do it like that.

BY MR. COLEMAN:

Q Ms. Louis, did you or Mr. Louis bring any documents to today's deposition?

A No, I don't have any documents.

MR. COLEMAN: I pass the witness. Any questions from DOJ?

MR. DELLHEIM: No questions.

[20] MR. SPITAL: No questions.

(Reading and signature not waived.)

(Whereupon, at 10:45 a.m., deposition was adjourned.)

---

[21] CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

NICOLE LOUIS

[22] CERTIFICATE OF SHORTHAND REPORTER – NOTARY PUBLIC

I, Steven Poulakos, registered Professional Reporter, the officer before whom the foregoing proceedings were taken, do hereby certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my supervision; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 6th day of March, 2007.

STEVEN POULAKOS
Notary Public

My commission expires:

June 17, 2009

[23] INDEX

Deposition of NICOLE LOUIS
March 1, 2007

EXAMINATION BY:

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Mr. Coleman.....4

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN
MUNICIPAL UTILITY
DISTRICT NUMBER ONE,
401 W. 15th Street, Suite 850
Austin, Texas 78701,

Plaintiff

vs.

Civil Action No.
1:06-CV-01384

ALBERTO GONZALES,
ATTORNEY GENERAL
OF THE UNITES STATES,
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530,

Defendant /

The deposition of TANYA CLAY HOUSE was held on Thursday, March 1st, 2007, commencing at 2:00 p.m. at the Law Offices of Weil, Gotshal, & Manges, LLP, 1300 Eye Street, N.W., Suite 900, Washington, D.C., before Steven Poulakos, Notary Public.

REPORTED BY: Steven Poulakos

[2] APPEARANCES:

On behalf of Plaintiff:

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[3] BY TELEPHONIC COMMUNICATION:

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On behalf of Louis intervenors:

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LDF
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Washington, D.C. 20005
202-682-1300

[4] Whereupon,

TANYA CLAY HOUSE,

called as a witness, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION BY MR. COLEMAN:

Q Good afternoon. I'm Greg Coleman. I represent the district in this lawsuit.

Would you state your name for the record?

A Tanya Clay House.

Q And you are affiliated with People for the American Way?

A Yes.

Q Can you tell me your position with the organization?

A I'm the director of our public policy department.

Q And you've been designated to testify today on behalf of People for the American Way?

A Yes, I have.

MR. BECKER: I should state just for the [5] record the notice was sent to People for the American Way Foundation and not The People for the American Way who is the actual party for this. We'll of course still appear for the deposition.

MR. COLEMAN: Thank you for overlooking that.

BY MR. COLEMAN:

Q Can you tell me a little bit about your position and what your job duties are?

A Well, as the director of the policy department I am responsible for overseeing all of our policy development organizationally, primarily on the federal level, but somewhat in an institutional level, and also I act as the chief lobbyist for our organization on Capitol Hill and as a representative of the organization on various levels programatically or through our media as well.

Q What aspects of your job duties made it so that you drew the short stick so you came to testify today.

What particularly qualified you to be the

* * *

[18] MR. BECKER: One second. You mean outside of that that may have already been produced to all of the parties or been even produced to us by other parties? You mean knowledge or information only we have right now?

MR. COLEMAN: The witness is the representative of the organization. So I'm trying to get the witness' understanding speaking for the organization.

THE WITNESS: Speaking – I do not have any additional knowledge as to information about the district, and again, I state that as not a member of the legal team. So that's not something that is within my purview.

BY MR. COLEMAN:

Q Sitting here today as a representative of the organization, do you have any complaint about any election that the district has held or the way that it was held?

MR. BECKER: Any particular election you're talking about?

[19] MR. COLEMAN: Any election.

THE WITNESS: I have a question.

MR. BECKER: Yes. For you or a question for me?

THE WITNESS: A question for you.

MR. BECKER: We're going to go off the record.

MR. COLEMAN: There's a question pending.

MR. BECKER: That's noted.

Do you think you can answer that without discussing – without talking to me first.

THE WITNESS: No.

MR. COLEMAN: Is it on attorney/client privilege? I don't think it's a privileged question.

MR. BECKER: I don't know what's in her mind because I haven't spoken to her. We will absolutely note for the record there's a question pending and we're going to confer briefly. I don't think it's going to be a particularly important point to make, but I have no problem with that.

MR. COLEMAN: We will briefly pause.

[20] MR. BECKER: Thanks. Excuse us just for a second.

(Witness confers with counsel)

BY MR. COLEMAN:

Q We're back on the record.

Would you like to have the question repeated?

A Sure.

(Whereupon the following portion of the testimony was repeated by the Court Reporter:

"QUESTION: Sitting here today as a representative of the organization, do you have any complaint about any election that the district has held or the way that it was held?")

THE WITNESS: Based upon my knowledge I don't have any complaint about the current elections within the district. I do acknowledge and recognize that there are – there is ongoing discovery pending;

however, I don't independently have any complaints regarding the elections in the district.

MR. COLEMAN: Nicely done.

[21] BY MR. COLEMAN:

Q Have you reviewed any of the deposition transcripts?

A I have not reviewed the deposition transcripts.

MR. BECKER: I've got to tell you, I haven't reviewed all of the deposition transcripts either so.

BY MR. COLEMAN:

Q I was just going to ask you, and we have obviously deposed a number of individual intervenors, and I just wanted to ask you if you understood that whether any of them have objected to any aspect of the elections that the district has had over the years?

A Having not reviewed them, I don't know.

Q Sitting here today without any current knowledge of any complaint regarding elections that have taken place, would it be safe to say that the organization's involvement in this suit is based on the claim that the district should be excluded from section 5 pre-clearance and not on a complaint about prior

* * *

[34] opposition was on that particular point or was it on some other aspect of the amendment, do you recall?

A It was – that was – I know it was on that point. I can't say that it wasn't necessarily on additional points as well.

Q Do you know of any state or political subdivision that People for the American Way would currently support a bailout for?

MR. BECKER: I'm going to object on the basis of relevance and also on the basis that it's outside the scope of the notice, but I'll let the witness answer, if she knows.

THE WITNESS: I don't know of any state or jurisdiction that would be – your question was be eligible for bailout?

BY MR. COLEMAN:

Q That the organization –

A Would support bailout, I can't speak to that. It's not a – no, I can't speak to that.

Q Why can you not speak to that? I want to make sure I understand.

[35] A I'm not aware whether – I'm not aware of anything, of any jurisdiction or state that people for would support that is currently eligible for a bailout.

MR. COLEMAN: I'm going pass the witness. Richard, any questions?

MR. DELLHEIM: No, I have no questions.

MR. COLEMAN: They would say you did better than me then.

MR. BECKER: I appreciate that.

MR. COLEMAN: You've been a lovely witness. Thank you for coming.

MR. BECKER: Thank you everybody.

(Reading and signature not waived.)

(Whereupon, at 2:52 p.m., deposition was adjourned.)

---

[36] CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

TANYA CLAY HOUSE

[37] CERTIFICATE OF SHORTHAND REPORTER – NOTARY PUBLIC

I, Steven Poulakos, registered Professional Reporter, the officer before whom the foregoing proceedings were taken, do hereby certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my supervision; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 6th day of March, 2007.

STEVEN POULAKOS
Notary Public

My commission expires:

June 17, 2009

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March 1, 2007

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street, Suite 850 Austin, Texas 78701,	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION NO. 1:06-CV-01384 (DST, PLF, EGS)
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITES STATES, U.S. Department of Justice 950 Pennsylvania Avenue, NW Washington, D.C. 20530,	)	
Defendant.	)	

****

ORAL DEPOSITION OF JOVITA CASARES

March 1, 2007

****

[2] APPEARANCES:

APPEARING FOR PLAINTIFF:

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Austin, Texas 78759

APPEARING FOR DEFENDANT:

Mr. Richard Dellheim
U.S. DEPARTMENT OF JUSTICE
Civil Rights Division
Voting Section
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950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

APPEARING FOR INTERVENOR-DEFENDANT, JOVITA CASARES:

Mr. George Korbel
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San Antonio, Texas 78212
-AND-
Ms. Alpha Hernandez
TEXAS RIO GRANDE LEGAL AID, INC.
902 E. 11th Street
Del Rio, Texas 78840

ALSO PRESENT:

MS. JOVITA CASARES,
the Witness;

MS. TERESA FAZ,
the Interpreter;
MS. SHIRLEY J. MORRISON
Certified Shorthand Reporter
in and for the State of Texas.

[3] DEPOSITION upon oral examination of the witness, JOVITA CASARES, taken at the instance of the Plaintiff, in the above entitled cause pending in

the United States District Court for the District of Columbia, before SHIRLEY J. MORRISON, Certified Shorthand Reporter in and for the State of Texas, on the 1st day of March, 2007, in the offices of the Texas Rio Grande Legal Aid, Inc., 902 E. 11th Street, Del Rio, Val Verde County, Texas, between the hours of 3:23 p.m. and 3:43 p.m., pursuant to the Federal Rules of Civil Procedure.

* * *

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[4] TERESA FAZ,

the Interpreter, being first duly cautioned and sworn to translate the questions from English into Spanish and the answers from Spanish into English, to the best of her skill and ability, did so as follows:

JOVITA CASARES,

having been first duly sworn, testified through the duly sworn interpreter as follows:

EXAMINATION

BY MR. WARD:

Q. Ms. Casares?

A. Yes.

Q. My name is Chris Ward, and I'm going to be taking your deposition today. Thank you very much for making yourself available. I represent the district that is the plaintiff in this lawsuit. And may I first ask you, do you know the name of the district that is the plaintiff in this lawsuit?

A. No.

Q. Okay. The district is called the Northwest Austin Municipal Utility District Number One. Do you know what a municipal utility district is?

INTERPRETER: Can you please repeat the question?

Q. (By Mr. Ward) Do you know what a municipal [5] utility district is?

A. No.

Q. Okay. Ms. Casares, where do you live?

A. I live here in Del Rio, Texas.

Q. And how long have you lived there?

A. For about 50-something years.

Q. Okay. And have you ever been to Austin?

A. Only to visit.

Q. Have you ever visited inside the district that's the plaintiff in this lawsuit?

A. No.

Q. Now, when I refer to the district in this deposition, it refers to that district that's the plaintiff in this lawsuit, the Northwest Austin Municipal Utility District Number One.

A. Okay.

Q. Now, do you know where the district is?

A. No.

Q. So you have never voted in the district?

A. Well, no. If I don't know where it's at, I cannot say that I have voted in that district. I only vote here in Del Rio.

Q. Of course. Do you know anyone who lives in the district?

A. No.

[6] Q. Do you know anything about –

MR. KORBEL: Just a minute, Chris.

A. Well, maybe I do know someone that lives in the district, but since I don't know the range or the size or what the district covers, I cannot say yes or no.

Q. Okay. So just – just to make clear, there may be people you know who do live in the district?

A. Exactly.

Q. But you don't know that they actually live there?

A. No.

Q. Okay. Do you know anything about how the district conducts its elections?

A. Well, I imagine that it's to the right of vote, or right to vote.

Q. When you say you imagine, you're not basing – I'm sorry. Let me start that question over.

When you say you imagine, am I correct in understanding that you do not have personal knowledge of how elections worked in the district? Is that correct?

A. Yes, it's correct.

Q. So your participation in this lawsuit is [7] not complaining about actual problems that you know about with elections in the district. Is that correct?

A. I don't understand exactly what you're asking.

Q. Let me try to say it a different way. You have said that you don't know about elections in the district.

A. Exactly.

Q. So you are not complaining about any problems with elections in the district. Is that correct?

A. That's correct.

Q. But you are participating in this lawsuit as an intervenor. Correct?

A. Yes.

Q. And do you understand what it means to participate in the lawsuit as an intervenor?

A. Yes. I do know because what I am trying to make the attorneys aware of here is that we do not want to lose our right to vote.

Q. By "here," do you mean Del Rio?

A. Not only in Del Rio, but anywhere in the country.

Q. And is it your understanding that this [8] lawsuit threatens the right to vote in some way?

A. Yes.

Q. Do you understand that this lawsuit is about a part of the Voting Rights Act and not about the whole Voting Rights Act?

A. Yes.

Q. And do you understand that the part of the Voting Rights Act that this lawsuit is about is the part that requires the district to request permission

from the federal government before making any changes in this election?

A. Yes, I understand that.

Q. And do you understand that if the district wins this lawsuit, it will still be required to provide full access to voting for all of its citizens?

MR. KORBEL: Chris, you're asking about the MUD now when you say "it"?

MR. WARD: Yes, the district, yes.

A. Can you please repeat the question, sir?

Q. (By Mr. Ward) Yes. Do you understand that if the district wins this lawsuit, that the district will still be required to provide full access to voting for all of the district citizens?

A. Yes, I understand.

[9] Q. How did you come to be involved in this lawsuit?

A. I have always defended the right to vote, and this was previously, all the time, because that's the way – that's the only way that we can prove that there is democracy in this country. And that's the only way that the community can participate in important decisions without any discrimination to minorities. Particularly, my family is Hispanic. Even though most of them are American citizens, we think – we think that we all have the right to vote on important issues that affect us directly. And I told the attorneys

that I have dealt with that every time it comes to defending the right to vote on important issues, to please involve me or get me involved.

Q. Okay. And without discussing the content of any conversations that you have had with your attorneys, can you tell me how you found out that this lawsuit existed?

A. Approximately six to eight months ago, in a conversation that I had with George Korbel, he told me or he let me know what this lawsuit was about. And I told him that if it was necessary for me to become involved in this case, that I would be willing [10] to do that.

Q. And you talked about your interest in voter participation. Do you know anything about the views of the district on the subject of voter participation?

A. Can you please rephrase or repeat the question, the last part.

Q. Yes. Let me try to phrase it more simply. Do you know how the board of the district thinks about voter participation?

A. No, I don't know what they – how they think because I don't talk directly to them. All I understand right now is the way in – the way it's going to affect us. How they think, I don't know. I couldn't – I couldn't know, but I can tell you how I think or what I think.

Q. Okay. But you have no information about how the district works for voter participation?

A. No, I have no idea. But I think that if they're going to take the right of vote from us, I think – or the bail-out, it is going to affect us directly – the mail-out, it's going to affect us directly.

Q. Okay. I think that's all the questions that I have. And I will thank Ms. Casares very much [11] for coming here.

A. Thank you.

MR. WARD: And pass the witness.

MR. KORBEL: I have no questions.

MR. DELLHEIM: And no questions on behalf of the United States.

MR. KORBEL: Are we off the record?

MR. WARD: All right. Then I think we are done and we should be off the record. Thank you, Ms. Casares.

THE WITNESS: God bless you, and thank you for making it very clear to me.

MR. WARD: Thank you very much.

CHANGES AND SIGNATURE
WITNESS NAME: JOVITA CASARES
DATE OF DEPOSITION: March 1, 2007

PAGE	LINE	CHANGE	REASON

[12] I, JOVITA CASARES, have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted above.

JOVITA CASARES

THE STATE OF TEXAS)
)
COUNTY OF VAL VERDE)

Before me, , on

this day personally appeared JOVITA CASARES, known to me (or proved to me under oath or through) (description of identity card or other document) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this day of , 2007.

Notary Public in and for
the State of Texas

[13] THE STATE OF TEXAS)
COUNTY OF BEXAR)

I, SHIRLEY J. MORRISON, Certified Shorthand Reporter in and for the State of Texas, do hereby certify that pursuant to notice, there came before me on the 1st day of March, 2007, at 3:23 p.m., at the offices of the Texas Rio Grande Legal Aid, Inc., 902 E. 11th Street, Del Rio, Val Verde County, Texas, the following named person, to-wit: JOVITA CASARES, who was by me duly sworn to testify to the truth and nothing but the truth of her knowledge touching and concerning the matters in controversy in this cause; that she was thereupon examined upon her oath and her examination reduced to typewriting under my supervision; and that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney nor counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in the action.

[14] WITNESS my hand and seal of office this the 7th day of March, 2007.

SHIRLEY J. MORRISON, Texas CSR 1057
Expiration Date: 12/31/08
Firm Registration No. 415
909 N.E. Loop 410, Suite 810
San Antonio, Texas 78209
(210) 222-9161

[LOGO]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	)	
VS.	)	CIVIL ACTION NO.: 1:06-CV-01384 (PLF, DST, EGS)
ALBERTO GONZALES, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES	)	

****

ORAL DEPOSITION OF

SHARLENE N. COLLINS

MARCH 2, 2007

VOLUME 2

****

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[113] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	*	
Plaintiff	*	Civil Action No.
VS.	*	1:06-CV-01384
ALBERTO GONZALES, in his official capacity as Attorney General of the United States	*	(PLF, DST, EGS)
Defendant	*	

****

ORAL DEPOSITION OF

SHARLENE N. COLLINS

MARCH 2, 2007

VOLUME 2

****

[114] **ORAL DEPOSITION OF SHARLENE N. COLLINS, VOLUME 2,** produced as a witness at the instance of the Defendant-Intervenors Texas State Conference of NAACP Branches and Austin Branch of the NAACP, and duly sworn, was taken in the above-styled and numbered cause on the 2nd day of March, 2007, from 2:42 p.m. to 4:22 p.m., before MARSHA EVANS, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand, at the offices of Armbrust & Brown, LLP, 100 Congress Avenue, Suite 1300, Austin, Texas,

pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

[115] **APPEARANCES**

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[116] FOR THE DEFENDANT-INTERVENORS TEXAS STATE CONFERENCE OF NAACP BRANCHES AND AUSTIN BRANCH OF THE NAACP:

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FOR THE DEFENDANT-INTERVENORS RODNEY AND NICOLE LOUIS:

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New York, New York 10007
212-513-3454

* * *

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[127] a social security number.

MS. PERALES: Thank you, Mr. Hicks.

Q. (By Ms. Perales) Let me ask you another MUD question which has come up a few times, and I think you may be the only person who can answer it. Is the MUD limited to annexing land that is contiguous to its boundaries?

A. No, it's not.

Q. And so it is possible under the law for a MUD to annex land that is not attached to it?

A. That's correct.

Q. Can you describe for me how you billed for your legal work to the MUD when you were working on the MUD's behalf?

A. I billed for general counsel work on a time matter. The firm bills in series of six-minute increments. .1 is six minutes. For work regarding the

issuance of bonds we worked with bond counsel on a percentage of the bond amount, and we were paid at the time the bonds closed.

Q. Did you provide monthly bills to the MUD or were they on any other schedule?

A. They were monthly other than for bond work.

Q. How did you bill the MUD for the preparation of preclearance submissions, if you recall? Did you [128] bill separately for that work or did you roll it into any other kind of work?

A. It was billed on an hourly basis, and it appeared on our monthly invoice for all work that we did for the district other than bond work.

Q. Okay. Thank you. Do you recall whether you used the same billing rate for the time spent on the preparation of MUD preclearance submissions as any other work related to the MUD, putting aside bonds?

A. I would have, yes.

Q. After the first preclearance submission that you prepared for the MUD which was related to the creation of the MUD, can you tell me if when preparing subsequent submissions you relied on sort of boilerplate language from earlier submissions?

A. We used a general form, yes.

Q. And with respect to, for example, background information about the MUD, would you also

carry that language forward from submission to submission?

A. It depends on the type of background information. If it was when the district was created, yes. If it had to do with information regarding populations, things like that, we would use information that we had gotten from the general manager at that time of submission.

* * *

[182] **SIGNATURE**

I, SHARLENE N. COLLINS, have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted on the previous page.

/s/ [Illegible]
SHARLENE N. COLLINS

THE STATE OF Texas

COUNTY OF Travis

Before me, Susan M. Pressler, on this day personally appears SHARLENE N. COLLINS, known to me (or proved to me under oath or through _____) (description of identity card or other document) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 15th day of March, 2007.

/s/ Susan M. Pressler
NOTARY PUBLIC IN AND
FOR THE STATE OF Texas

[SEAL]

SUSAN M PRESSLER
My Commission Expires
February 24, 2008

[183] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE	*	
Plaintiff	*	Civil Action No.
VS.	*	1:06-CV-01384
ALBERTO GONZALES, in his official capacity as Attorney General of the United States	*	(PLF, DST, EGS)
Defendant	*	

****

REPORTER'S CERTIFICATION
DEPOSITION OF SHARLENE N. COLLINS
MARCH 2, 2007
VOLUME 2

****

I, MARSHA EVANS, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, SHARLENE N. COLLINS, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on MAR 12 2007 to the witness or to the attorney for the witness for examination, signature, and

return to ACUSCRIBE COURT REPORTERS by APR 12 2007 ;

That the amount of time used by each party at the deposition is as follows:

Ms. Nina Perales – 1 hour, 2 minutes
Mr. Chris Herren – 23 minutes
Mr. Max Renea Hicks – 5 minutes
Mr. George Korbel – 2 minutes.

[184] I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me on March 12, 2007.

/s/ Marsha Evans
MARSHA EVANS, TEXAS CSR 5100
Expiration Date: 12/31/07
Firm Registration No. 241
114 West 7th Street, Suite 750
Austin, Texas 78701
512-499-0277

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,	)	
Plaintiff,	)	**Civil Action No. 1:06-CV-01384 (DST, PLF, EGS)**
v.	)	
ALBERTO GONZALES, Attorney General of the United States, et al.,	)	
Defendants.	)	

EXPERT REPORT

OF TERRY L. MUSIKA

March 9, 2007

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

v.

ALBERTO GONZALES, Attorney General of the United States, et al.

EXPERT WITNESS REPORT OF

TERRY L. MUSIKA

QUALIFICATIONS

1. I am the CEO of Invotex Group as well as a CPA with over thirty-two years of business experience. I am a former audit and consulting partner for the international accounting firm of Coopers & Lybrand (now PricewaterhouseCoopers), former

Managing Director for Navigant Consulting, Inc. and I have previously formed, owned and operated a proprietary database company, a national financial and economic consulting firm, and a merger and acquisition company. Additionally, I have frequently served the Federal Court system as a Court Appointed Chapter 11 Operating Trustee, Liquidating Chapter 7 Trustee, Operating Chapter 7 Trustee, Examiner, and Paying Agent. Finally, I previously served as the partner in charge of Coopers & Lybrand's state and local government practice and have audited and provided consulting services to numerous units of local government (including but not limited to the city and county of Los Angeles, CA, the city and county of San Francisco, CA, Orange County Sanitation District of Orange County, CA, Long Beach, CA, Huntington Beach, CA, Beverly Hills, CA, Boston, MA, and Anne Arundel County, MD) numerous state governments (including but not limited to the State of Indiana, Commonwealth of Virginia and the State of Maryland) and various agencies of the federal government (including but not limited to the FBI, SEC, State Department, FDIC, and Department of Justice).

2. My business address is 1637 Thames Street, Baltimore, MD 21231. **Exhibit A** is a copy of my current *curriculum vitae* that lists my work experience, academic degrees, and publications.

3. During the past thirty-three years I have provided expert testimony in over one hundred and fifty separate proceedings before forty-one different Federal District Courts throughout the U.S., eight separate state courts, numerous proceedings

before the U.S. Court of Federal Claims, four separate U.S. Bankruptcy Courts, numerous arbitration matters and the United States International Trade Commission. I was accepted as a designated expert in all cases. **Exhibit B** lists the cases in which I have testified as an expert witness in deposition and at trial from 2002 to the present.

4. My standard hourly billing rate is $450 per hour for services performed in this matter. In addition, I will be reimbursed for all reasonable out-of-pocket expenses incurred in connection with my analyses and testimony in this case.

ASSIGNMENT

5. I have been retained by Wilmer Cutler Pickering Hale and Dorr LLP on behalf of the Texas State Conference of NAACP Branches and the Austin Branch of the NAACP to review and evaluate the extent of the financial burden of compliance with Section 5 of the Voting Rights Act ("VRA") imposed on the Northwest Austin Municipal Utility District Number 1 (the "District") – the absolute financial burden, as well as the financial burden relative to the District's total financial burden.

BACKGROUND

6. I am advised by counsel that Section 5 of the VRA, in covered jurisdictions, requires the suspension of all new voting regulations pending review by federal authorities – either the United States Department of Justice or a three-judge

federal court in Washington, DC – to determine whether the use of proposed voting changes would perpetuate voting discrimination. Under Section 5, any voting change with respect to a covered jurisdiction, or any political sub-unit within the jurisdiction, cannot be legally enforced until and unless it receives the required determination by the Department of Justice or by a federal court in Washington, DC, a process known as pre-clearance. Texas became covered by Section 5 as of September 22, 1975, when Section 5 was broadened to address additional voting discrimination against members of "single language minority" groups, in this case the group of persons of Spanish heritage.[1] The District conducts periodic elections for the selection of its board members, which are required to be conducted in compliance with the VRA.

7. The District is a political body located in the City of Austin, Travis County, Texas. The District was formed on March 16, 1988 by order of the Texas Water Commission, predecessor to the Texas Commission on Environmental Quality ("TCEQ"), which has supervisory jurisdiction over the District. The District is empowered, among other things, to purchase, construct, operate and maintain all works, improvements, facilities and plants necessary for the supply and distribution of water; the collection, transportation and

---

[1] http://www.usdoj.gov/crt/voting/sec_5/about.htm; http://www.usdoj.gov/crt/voting/sec_5/covered.htm; Federal Register, Vol. 40, No. 185.

treatment of wastewater; and the control and diversion of storm water.[2]

8. "The District was created to provide water, wastewater and storm drainage to the approximately 709.7 acres within its boundaries, all of which lays within Travis County, Texas and within the city limits of the City of Austin, Texas."[3] The District was formed to facilitate development by private home builders. To accomplish this mission, the District borrowed money in the municipal bond market, used the bond proceeds to complete the necessary water, wastewater and storm drainage construction and established a property tax on District residents to provide revenue to retire the debt and cover annual operations during the period of the District's existence. The repayment of debt principal and annual interest costs is accounted for in the District's Debt Service Fund. The water, wastewater and storm drainage construction is accounted for in the District's Capital Projects Fund. Finally, the District's General Fund accounts for annual property tax proceeds and general operating expenses of the District. There is virtually no activity left in the District's Capital Projects Fund as the construction is now complete. **Exhibit G** indicates that as of the fiscal year ended September 30, 2005, the District had $12,239,187 of bonds still outstanding. The District incurred $760,583

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[2] Official Statement, Unlimited Tax Refunding and Improvement Bonds, Series 2006, p28.

[3] Official Statement dated June 14, 2006, p5.

of interest expense in the same year. The District's interest expense is its single largest expense category. The interest expense will continue until the District's bonds are retired. The General Fund of the District has had average annual expenditures of $219,424. General Fund expenditures were generally higher during the early stage of the District's existence. Because construction is complete, once the bonds are retired, the District's activities will be reduced to a maintenance level.

SUMMARY OF OPINIONS

Based on my review of the facts of this matter and on my analysis, I have reached the following conclusions:

9. The estimated absolute financial burden of compliance with Section 5's pre-clearance requirement on the District has been an average of $223 per year. (**Exhibit F**).

10. The estimated financial burden on the District of compliance with Section 5's pre-clearance requirement has been less than one-tenth of one percent (less than 0.1%) of the District's average annual expenditures.[4] (**Exhibits E and F**). Further, the District has reported no material expenditure with respect to its compliance with Section 5 in the audited financial statements.

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[4] Average annual expenditures are defined as average annual general fund expenditures/expenses plus the average annual interest expense on outstanding bonds for the period 1989 through 2005.

11. The future financial burden on the District of compliance with Section 5 is likely to be zero or close to zero as a consequence of an agreement between the District and Travis County pursuant to which Travis County will conduct joint elections with the District.

OPINIONS

Past Absolute Financial Burden on the District

The estimated absolute financial burden of compliance with Section 5's pre-clearance requirement on the District has been an average of $223 per year.

12. The minimal financial burden imposed on the District by compliance with Section 5 is illustrated in **Exhibit F. Exhibit F** shows that over the *entire* life of the District through 2005, the District's total estimated expenditure on compliance with Section 5 has been $4,479, an average annual estimated expenditure of $223.

13. In determining the absolute and relative financial burden of the District caused by compliance with Section 5, my first step was to identify any actual costs incurred by the District in connection with its compliance with the provisions of Section 5. **Exhibit C** is a compilation of the financial reporting history of the District from its inception on March 16, 1988 through the most recent reporting period. This compilation is based on the financial reporting documents produced by the

District and on publicly available information.[5] **Exhibit D** is a compilation of the District's Section 5 submissions. I reviewed the financial reporting information contained in **Exhibit C** with the Section 5 submissions in **Exhibit D** to determine the nature and extent of any and all identified expenditures associated with the District's Section 5 submissions.

14. I also relied upon testimony and billing records of the District's past and present outside general counsels, as well as District board members. A good source of information relating to the actual costs in connection with its compliance with Section 5 is the sworn testimony of the District's former general counsel from inception to 2002, Ms. Sharlene Collins. Ms. Collins testified that election-related work constituted approximately "5 percent"[6] of total general counsel work performed by her office for the District. Preclearance work is just one of a number of the District's election-related expenses. Therefore, it amounts to a very small part of the total legal expenses of the District and an even smaller part of the District's total expenditure.

15. Ms. Collins testified that a typical Section 5 submission related to moving a polling location took her "probably two hours."[7]

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[5] Official Statement, Unlimited Tax Bonds, Series 1992, p7.

[6] Deposition transcript of Collins (rough draft), p28.

[7] Deposition transcript of Collins (rough draft), p34.

16. Ms. Collins testified that the typical Section 5 submission including annexation "probably ends up being more, three to six hours' worth of work."[8] Only one of the eight Section 5 submissions ever made by the District has related to annexation.

17. Ms. Collins testified that "I don't think I ever had one of the board members take a look at the submission."[9] In his deposition, Mr. Zimmerman, who was on the board of directors at the time of the 2004 submission, testified that he spent "probably ten minutes" reviewing the submission and that would be about the same time the other four Directors spent as well.[10] Thus, other than the time spent by the outside general counsel, minimal, if any, time was spent on a Section 5 pre-clearance submission by the District.

18. **Exhibit F** lays out my analysis with respect to estimating the cost of the eight Section 5 pre-clearance submissions over the life of the District. Based on deposition testimony and billing records of former and current general counsels to the District, I estimated the expenditures related to the eight pre-clearance submissions. This totals to $4,463. Over a 20-year period, from 1986 through 2005, the District's average annual estimated expenditures on pre-clearance compliance was $223.

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[8] Deposition transcript of Collins (rough draft), p34.

[9] Deposition transcript of Collins (rough draft), p113.

[10] Deposition transcript of Zimmerman (rough draft), p49.

Past Financial Burden Relative to the District's Total Financial Burden

The District has reported no material expenditures/expenses in connection with its compliance with the pre-clearance provisions of Section 5 of the VRA.

19. Based on a review of the District's annual financial statements from 1989-2005 (**Exhibit E**), the District's auditors have concluded that the District has incurred no material expenditure in connection with the District's compliance with Section 5. The essence of the concept of materiality is "the omission or misstatement of an item in a financial report is material if, in light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item."[11]

20. The District's financial statements include no entry for any material costs for Section 5 compliance, indicating that the presence or absence of costs associated with Section 5 compliance would not change or influence a reasonable person reviewing the report. Although there are individual line item expenses reported as low as $819 (lab fees in 1991), there are no specified pre-clearance

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[11] Statement of Financial Accounting Concepts issued by the Financial Accounting Standards Board, CON 2: Qualitative Characteristics of Accounting Information, Para 132.

expenses deemed material enough to be separately reported.

21. The District annual financial year end is September 30th of each calendar year. Many of the annual financial statements listed on **Exhibit C** have been audited by an outside independent CPA firm. For example, the District financial statements for the year ended September 30, 2005 were audited by Maxwell Locke & Ritter LLP.[12] The Maxwell Locke & Ritter LLP auditor's opinion states that "In our opinion the financial statements referred to above present fairly, in all material respects, the respective financial position of the governmental activities and each major fund of the District as of September 30, 2005, and the respective changes in financial position and the respective budgetary comparison for the General Fund for the year then ended in conformity with accounting principles generally accepted in the United States of America."[13]

The estimated financial burden on the District of compliance with Section 5's pre-clearance requirement has been less than 0.1% of the District's average annual expenditures.

22. **Exhibit F** lays out my analysis of the estimated cost of the eight Section 5 pre-clearance submissions over the life of the District. Based on the deposition testimony and billing records of the former and current outside general counsels to

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[12] P007778-P007818 at P007780.

[13] P007780.

the District, I estimated the total cost to the District of the eight pre-clearance submissions. This amount totals to $4,463. Over a 20-year period, from 1986 through 2005, the average annual estimated pre-clearance cost was thus $223. 1 divided this amount by the District's average annual expenditure of $548,338 (**Exhibit E**). Using those figures, I calculated that the District's estimated average Section 5 expenditure has been 0.04% of the District's average annual total expenditures.

A Section 5 pre-clearance submission efficiently and effectively establishes an internal control to aid in ensuring that the District has complied with applicable laws and regulations including civil rights, thereby helping avoid excess interest costs on bond debt.

23. The nature and scope of the audits performed by the District's outside auditors include the determination of whether the District has generally complied with applicable laws and regulations including civil rights. The outside auditors indicated that failure to comply would be material to major federal assistance programs.

24. In a January 3, 1996 opinion letter to the Board of Directors, the outside auditors, Pena Swayze & Co., L.L.P. stated "We conducted our audit in accordance with generally accepted auditing standards; *Government Auditing Standards,* issued by the Comptroller General of the United States; and Office of Management and Budget Circular A-128, *Audits of State and Local Governments.* Those standards and OMB Circular A-128 require that

we plan and perform the audit to obtain reasonable assurance about whether the general purpose financial statements are free of material misstatement and about whether Northwest Austin Municipal District No. 1 complied with laws and regulations, noncompliance with which would be material to a major federal financial assistance program."[14]

25. In another letter, also dated January 3, 1996 to the Board of Directors from the same outside auditors, the auditors stated "We have applied procedures to test Northwest Austin Municipal District No. 1's compliance with the following requirements applicable to its federal financial assistance programs, which are identified in the Schedule of Federal Financial Assistance, for the year ended September 30, 1995: Political Activity, Davis-Bacon Act, Civil Rights, Real Property Acquisition, Federal Financial Reports, Allowable Costs/Cost Principles, Drug-Free Workplace Act, and Administrative Requirements."[15]

26. Accordingly, the District's minimal expenses associated with obtaining the Section 5 preclearance submission are an efficient and effective means of establishing an internal control to help ensure that the District has complied with the VRA. Removing the Section 5 pre-clearance submission option would not remove the District's requirement to comply with the VRA and would not remove the District's responsibility to

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[14] P002479.

[15] P002484 (emphasis added).

establish that they have complied with the VRA. Without the pre-clearance procedure, the District would have to incur some other expense to help satisfy the auditor's requirement that the District has complied.

27. **Exhibit G** identifies the amount of District's outstanding indebtedness, principal retirement, interest expense and other debt service expenses on an annual basis since the inception of the District. The annual interest expense has been the largest single expense for the District in most years. The annual interest expense is even larger than total general fund's expenditures for most years. Further, in certain years the District incurs significant fiscal agent fees to facilitate the issuance of District bonds at the best rate possible. For example, the District paid "fiscal agent fees and other" of $122,684 in 2005.[16] The amount of interest expense paid on the District's bonded indebtedness is based on the bond's interest rate. The bond's interest rate is largely determined by the credit rating assigned to the District's bonds. Based on the size of the District's indebtedness and the length of the time such bonds remain outstanding, a slight change in the District's bond rating and interest rate could have a significant impact on the District's interest expense and overall financial health.

28. WM Financial Strategies ("WM") is an independent municipal bond consultant that provides advice

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[16] Northwest Austin Municipal Utility District No. 1 annual financial statements for the year ended September 30, 2005.

and assistance to bond issuers concerning ways in which they can support a favorable bond rating and minimize interest costs. WM indicated that rating agencies consider the following factors in rating general obligation bonds.

- "Economy"
- "Debt Structure"
- "Financial Condition"
- "Demographic Factors"
- "Management practices of the governing body and administration"[17]

29. The periodic cost of a Section 5 pre-clearance submission (see **Exhibit F**) is a fraction of the annual average interest cost of $328,914 (**Exhibit G**). One way of viewing the Section 5 pre-clearance submission cost is as an insurance policy to ensure a favorable debt rating. Removing the nominal cost and allowing the District to establish an internal control over its compliance on a voluntary basis could subject the District to an imprudent risk.

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[17] http://www.munibondadvisor.com/rating.htm.

Future Financial Burden

The future financial burden on the District of compliance with Section 5 is likely to be zero or close to zero as a consequence of an agreement between the District and Travis County pursuant to which Travis County will conduct joint elections with the District.

30. Based on my review of documents from the District, future costs of the District for compliance with Section 5 appear likely to be zero or near zero. The District entered into two Election Agreements with Travis County in 2004 and 2006. The 2006 agreement is valid through July 1, 2011 and renews automatically for two additional three-year terms unless one of the parties notifies to terminate.[18] According to the testimony of Ms. Qualtrough, "this agreement was going to be very beneficial for the MUD and the voters" and "it ended up saving the District quite a bit of money."[19] The Election Agreement provided that the District was not responsible for compliance with Section 5 pre-clearance submission related to the joint election that directly affected Travis County.[20] In addition, the District does not have any plans to propose voting changes that would require pre-clearance submissions.[21]

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[18] P009731.

[19] Deposition transcript of Qualtrough (rough draft), p46.

[20] P009711.

[21] Deposition transcript of Zimmerman (rough draft), p58-59.

DOCUMENTS AND INFORMATION CONSIDERED

31. **Exhibit H** contains a list of information that I have considered in forming my opinions in this matter. In the event additional information becomes available, I may supplement my opinions expressed herein.

POSSIBLE REVISIONS TO THIS REPORT

I intend to review and consider any additional information provided to me after the production of this report and will supplement my analysis and conclusions if asked to do so, and if appropriate.

/s/ Terry L. Musika Date: March 9, 2007
Terry L. Musika

INVOTEX GROUP **EXHIBIT A**

Terry L. Musika
CEO

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Education and professional

- BS, 1970, Indiana University
- Master of Public Affairs in Public Finance, 1974, Indiana University Graduate School of Public and Environmental Affairs
- Certified Public Accountant (CPA), licensed in MD

Employment

- Invotex Group
- Maryland First Financial Services Corp. and Intellectual Property Management & Finance, LLC
- Navigant Consulting, Inc.
- PENTA Advisory Services, LLC
- C.W. Amos & Company, LLC
- Maryland First Financial Services Corp.
- Coopers & Lybrand
- Peat Marwick & Mitchell

Professional associations

- American Institute of Certified Public Accountants
- Association of Insolvency and Restructuring Advisors
- Association of University Technology Managers

- Maryland Association of Certified Public Accountants
- Licensing Executives Society
- Intellectual Property Owners' Damages Committee
- Maryland Court-Appointed Special Advocate
- Health Technology Assessment International

Terry L. Musika, CPA, MPA

Current Position

Mr. Musika is the Chief Executive Officer of Invotex Group. As CEO, Mr. Musika has overall responsibility for the management and strategic direction of the firm. In addition to his duties as CEO, Mr. Musika serves a broad range of client engagements involving matters of accounting, finance, valuation and general business planning and restructuring.

Professional Experience

Mr. Musika has served the accounting profession in a variety of roles and responsibilities for over 30 years. His experience includes every level of the accounting and auditing profession from staff level auditor to National Audit Partner in one of the world's largest international accounting firms. Mr. Musika's experience includes 15 years as an auditor and consultant in a wide range of industries for two international accounting firms and one regional accounting firm.

Mr. Musika's prior "Big 4" public accounting background includes five years with Peat, Marwick and Mitchell (predecessor of KPMG) as auditor and consultant and seven years with Coopers & Lybrand (predecessor of PricewaterhouseCoopers) as a national research consultant, audit partner and Partner-In-Charge of the Firm's Baltimore Business Investigative Services Practice. Mr. Musika's audit and consulting experience includes both private and public companies from various industries and numerous governmental entities. Mr. Musika also established and served as the Member-in-Charge of the consulting practice for C.W. Amos & Company, a regional accounting firm.

Federal And State Court Appointments

Mr. Musika has been appointed by both Federal and State Court Judges on numerous occasions to provide the court systems with a range of trustee duties and services. Mr. Musika has served the Federal Court system as a Court Appointed Chapter 11 Operating Trustee, Liquidating Chapter 7 Trustee, Operating Chapter 7 Trustee, Examiner, Liquidating and Paying Agent. Mr. Musika has served the state court system as Receiver, Special Master and Court Appointed Special Advocate. Mr. Musika also served as a member of the Panel of Chapter 7 Trustees for the U.S. Trustee in Maryland for eight years.

Business Founder, Owner And Operator

Mr. Musika has formed, owned and operated four separate companies. Mr. Musika founded both Maryland First Financial Services Corp. and Intellectual Property Management & Finance, LLC, which were combined and now operate as Invotex Group. Previously, Mr. Musika owned and operated Central Data Technologies, a proprietary database company that maintained a private database of financial information and regional economic data on Chapter 11 bankruptcies. Mr. Musika also founded and served as President and CEO of PENTA Advisory Services ("PENTA"), a national financial and economic consulting firm. Mr. Musika began PENTA as the first employee and eventually built the company into 125 accounting, economic and legal professionals with offices in Washington DC, Baltimore, Richmond, Wilmington, New York and Atlanta. Mr. Musika eventually sold PENTA to Navigant Consulting, Inc.

Expert Testimony

During the past 33 years Mr. Musika has provided expert testimony in over 150 separate proceedings before 41 different Federal District Courts throughout the U.S., eight separate state courts, numerous proceedings before the U.S. Court of Federal Claims, four separate U.S. Bankruptcy Courts, numerous arbitration matters and the United States International Trade Commission. Mr. Musika's intellectual property experience encompasses patent, trademark, trade secret and copyright matters. He has performed

numerous damage analyses including both reasonable royalty and lost profit calculations. Mr. Musika's antitrust damage opinion and expert qualifications were recently cited in a published opinion by The United States Court of Appeals for the Third Circuit.

Papers, Publications, And Presentations

- "IP Valuation," November 16, 2004, presentation to the UMBC Technology Center (with Debora R. Stewart, CPA).
- "Strategic Valuation Issues Related to the Sale and Purchase of IP Out of Bankruptcy," September 18, 2003, presentation to the BioAlliance Network of the Tech Council of Maryland (with Charles R. Goldstein, CPA).
- "Tax Implications of Intellectual Asset Management," March 12, 2002, Kilpatrick Stockton LLP's IP Masters Teleconference Series (with John K. Lyons, CPA).
- "Valuation of Intellectual Property," May 22, 2001, presentation at the Licensing Intellectual Property Conference of the American Conference Institute.
- "Don't Shoot the Messenger! A Response to the Bankruptcy Information on the Internet Debate," Bankruptcy Court Decisions Weekly News & Comment, September 15, 1998.
- "Creating A Company to Capitalize on Your Technology," January 14, 1998, presentation to the Washington, DC Chapter of the Licensing Executives Society.

- "How Creditors Can Use Regional Bankruptcy Data," Business Credit, October 1997. (with Charles R. Goldstein, CPA).
- "Valuation of Intellectual Properties - Case Studies," 1997, Licensing Executives Society (LES) Annual Meeting.
- "Approaches to Prejudgment Interest Awards Vary by Court," Legal Times Special Report on Intellectual Property, April 7, 1997 (with Gregory E. Smith, CPA).
- "Valuation of Intellectual Property Assets," 1996, presentation to the Greater Richmond Intellectual Property Law Association (GRIPLA).
- "Prejudgment Interest in Patent Damage Decisions, A Quantitative Analysis," ALI-ABA Trial of A Patent Case Study Materials, September 1995.
- "Trial of A Patent Case," 1993-1995, faculty member and presenter for the American Law Institute – American Bar Association (ALI-ABA), sponsored with the cooperation of the Intellectual Property Law Association of Chicago.
- "Implementing SOP 90-7 for Bookkeeping and Financial Reporting of Companies in Chapter 11." The Journal of Professional Bookkeeping and Management, May 1992 (with Jalal Soroosh, Ph.D.).
- "Financial Reporting Under Chapter 11," The CPA Journal, December 1991.

- "AICPA's Statement of Position on 'Financial Reporting By Entities in Reorganization Under Bankruptcy Code" *NABTALK* 1991, pp. 15-20.
- "Montgomery's Auditing-Tenth Edition," 1985 (contributing author).

INVOTEX GROUP **EXHIBIT B**

TERRY L. MUSIKA, CPA, MPA

TESTIMONY, AFFIDAVITS AND EXPERT REPORTS

2002 – PRESENT

Litigation Cases

- Expert Report in Cheryl Clevenger v. Dillard's Department Stores, Inc., et al. v. Towers, Perrin, Forster & Crosby, Inc. v. Friday Eldridge & Clark, LLP, Case No.C-1-02-558, U.S. District Court for the Southern District of Ohio, Western Division (report filed in 2007).
- Expert Report in A.S. Kleeman & Associates, Inc. v. ICT Group, Inc., Case No. 30 181 Y 00368 06, before the American Arbitration Association of Atlanta, Georgia (report filed in 2007).
- Expert Report in Elite Logistics Services, Inc., Elite Logistics, Inc., and Harold Pace, II v. ATX Technologies, Inc., and Bobby Ford, Inc., Civil Action No. G-22-866, U.S. District

Court for the Southern District of Texas (Galveston Division) (report filed in 2006).

- Deposition Testimony and Expert Reports in United States of America, Ex. rel. Richard F. Miller v. Philipp Holzmann A.G., et al., Case No. 1:95-cv-01231, U.S. District Court for the District of Columbia (deposition testimony given and reports filed in 2006).

- Deposition Testimony and Expert Reports in G. David Jang, M.D. v. Boston Scientific Corporation; Scimed Life Systems, Inc., Case No. EDCV 05-00426 VAP (CTx), U.S. District Court for the Central District of California (Eastern Division – Riverside) (deposition testimony given and reports filed in 2006).

- Expert Reports in Brighton Pharmaceuticals, Inc. v. Atley Pharmaceuticals, Inc., Civil Action No. 3:06CV301, U.S. District Court for the Eastern District of Virginia (reports filed in 2006).

- Expert Report in TRPB LLC v. Seacoast Capital Partners II, L.P. and Patriot Capital, L.P., Chancery No. 193095, Circuit Court for Fairfax County, Virginia (report filed in 2006).

- Deposition Testimony and Expert Reports in Rasterex Holdings, LLC v. Research in Motion, Ltd., Arizan Corporation, Darrell Knight, and Olav A. Sylthe, Case No. 2003-cv-76785, Superior Court of Fulton County, State of Georgia (deposition testimony given and reports filed in 2006).

- Deposition Testimony and Expert Report in Telcordia Technologies, Inc. v. CISCO Systems, Inc., Case No. 04-876-GMS, U.S. District Court for Delaware (Wilmington) (deposition testimony given and report filed in 2006).

- Testimony in the arbitration between Syngenta Crop Protection, Inc. (Claimant) and Oxon Italia, S.p.A. and Sipcam Agro USA, Inc. (Respondents), Docket No. AAA 16 171 00180 05 before the American Arbitration Association (arbitration testimony given in 2007; direct testimony filed in 2006).

- Trial and Deposition Testimony and Expert Report in Talisman Capital Talon Fund, Ltd. v. Rudolf W. Gunnerman and SulphCo, Inc., Case No. 3:05-cv-00354-BES-RAM, U.S. District Court for the District of Nevada (Reno) and EcoEnergy Systems, Inc. v. Rudolf W. Gunnerman, Peter Gunnerman, SulphCo, Inc., RWG, Inc. and DOES I-X, Case No. CV-05-01346, Dept. 9, in the Second Judicial District Court of the State of Nevada in and for the County of Washoe (trial and deposition testimony given and report filed in 2006).

- Deposition Testimony and Expert Report in Charles Schwab & Co., Inc. v. Brian D. Carter, et al., Case No. 1:04-cv-07071, U.S. District Court for the Northern District of Illinois (Eastern Division) (deposition testimony given and report filed in 2006).

- Arbitration Testimony and Expert Testimony Statement in Makhteshim Agan of North America, Inc. in an arbitration against BASF Corporation (arbitration testimony given and statement filed in 2006).

- Expert Reports in Wilmington Trust Company, et al. v. Michael L. Strauss, Index No. 601192/03, State Supreme Court of New York (reports filed in 2005 and 2006).

- Deposition Testimony and Expert Reports in Warrior Lacrosse, Inc. v. STX LLC, Inc., Case No. 2:04-cv-70363-JAC-WC, U.S. District Court for the Eastern District of Michigan (Detroit) (deposition testimony given and reports filed in 2005).

- Expert Reports in Joseph Farda and Ann C. Farda, Farda Outlets, LLC, Farda Realty Associates, LP v. Chelsea Property Group, Inc., CPG Partners, LP and William G. Reddinger, Case No. 000926, Philadelphia County Court of Common Pleas, Trial Division (reports filed in 2005 and 2006).

- Expert Report in Maden Tech Consulting, Inc. v. Pappas et al., Case No. 1:05-cv-00777-CMH-TCB, U.S. District Court for the Eastern District of Virginia (Alexandria) (report filed in 2005).

- Deposition Testimony and Expert Report in Windy City v. America Online, Inc., Case No. 1:04-cv-04240, U.S. District Court for the

Northern District of Illinois (Chicago) (deposition testimony given and report filed in 2005).

- Deposition Testimony and Expert Reports in MedPointe Healthcare, Inc. v. Hi-Tech Pharmacal Co., Inc. dba Health Care Products, Case No. 3:03-cv-05550-MLC-JJH, U.S. District Court for the District of New Jersey (Trenton) (deposition testimony given in 2006; reports filed in 2005 and 2006).

- Expert Report in Ole K. Nilssen and Geo Foundation, Ltd. Universal Lighting Technologies, Inc., Case No. 3:04-cv-00080, U.S. District Court for the Middle District of Tennessee (Nashville) (report filed in 2005).

- Deposition Testimony and Expert Reports in Steri-Lube Intl. Ltd., et al. v. Western Phase Change, et al., Case No. 99-CV-127, U.S. District Court for the District of Arizona (Phoenix) (deposition testimony given and reports filed in 2005).

- Expert Report in Joseph A. Robinson and Motorworks, Inc. and AR22, Inc. v. Berwind Financial, LP and Berwind Securities Corp., Case No. 000220, Philadelphia County Court of Common Pleas (report filed in 2005).

- Expert Report in Chase Mortgage Corp. v. Advanta Corp., Case No. 1:04-cv-00113-KAJ, U.S. District Court of Delaware (Wilmington) (report filed in 2005).

- Deposition Testimony and Expert Report in Kaiser Tool Company, Inc. v. Thomas K.

Weaver, Circle Machine Company and Kennametal, Inc., Cause No. 02D01-0210-PL-498, Circuit and Superior Courts, 38th Judicial Court, Allen County, Indiana (deposition testimony given and report filed in 2005).

- Deposition Testimony and Expert Report in Mangosoft, Inc., et al. v. Oracle Corporation, Case No. 1:02-cv-00545-SM, U.S. District Court for the District of New Hampshire (Concord) (deposition testimony given and report filed in 2005).

- Deposition Testimony and Expert Reports in Softcard Systems v. Target Corporation, et al., Case No. 1:03-cv-03585-ODE, U.S. District Court for the Northern District of Georgia (Atlanta) (deposition testimony given and reports filed in 2005).

- Deposition Testimony and Expert Reports in C. Graham Berwind, Jr. v. Royal Van Lent Shipyard B.V., Case No. 2:03-cv-03576-RB, U.S. District Court for the Eastern District of Pennsylvania (Philadelphia) (deposition testimony given and reports filed in 2005).

- Deposition Testimony, Declaration and Expert Report in Solvay Pharmaceuticals, Inc. v. Global Pharmaceuticals and Impax Laboratories, Inc., Case No. 03-2854 DWF/SRN, U.S. District Court for the District of Minnesota (declaration filed in 2006; deposition testimony given and report filed in 2005).

- Deposition Testimony and Expert Report in MMI Products, Inc. v. Long et al., Case No. 1:03-cv-02711-PJM, U.S. District Court for the District of Maryland (Baltimore) (deposition testimony given and report filed in 2005).

- Arbitration and Deposition Testimony and Expert Report in the Matter of the Arbitration between TurboChef Technologies, Inc. and Maytag Corporation, No. 71 133 00185 02 (arbitration and deposition testimony given and report filed in 2005).

- Expert Report in Melea Ltd. et al. v. Alliance Gas Systems Inc. et al., Case No. 2:04-cv-70530-GER-DAS, U.S. District Court for the Eastern District of Michigan (Detroit) (report filed in 2005).

- Deposition Testimony in Charles A. Stanziale, Jr. v. Ernst & Young LLP, Case No. C-03-2201, Circuit Court for Baltimore County, Maryland (deposition testimony given in 2005).

- Deposition Testimony and Expert Report in T. Rowe Price Group, Inc. v. Charles Schwab & Co., Inc., Civil Action No. 03-03396 (MJG), U.S. District Court for the District of Maryland (Greenbelt) (deposition testimony given and report filed in 2004).

- Expert Report in Dow Agrosciences LLC v. Crompton Corporation and Uniroyal Chemical Co., Inc., Case No. 1:03-CV-0654-SEB-JPG, U.S. District Court for the Southern

District of Indiana, Indianapolis Division (report filed in 2004).

- Declarations in Warner-Lambert Company, et al. v. Purepac Pharmaceuticals, et al., Case No. 2:00-cv-02931-JCL-MF, U.S. District Court for the District of New Jersey (declarations filed in 2004).

- Deposition Testimony and Expert Report in Metropolitan Medical Services of NC, Inc., et al. v. Draegerwerk AG, et al., Case No. 1:04CV266, U.S. District Court for the Eastern District of Texas, Beaumont Division (deposition testimony given and report filed in 2004).

- Deposition Testimony and Expert Report in Syngenta Seeds, Inc. v. Monsanto Company; DeKalb Genetics Corp.; Pioneer Hi-Bred International, Inc.; Dow Agrosciences, LLC; Mycogen Plant Science, Inc. and Agrigenetics, Inc., Civil Action No. 02-1331-SLR, U.S. District Court for the District of Delaware (deposition testimony given and report filed in 2004).

- Deposition Testimony and Expert Report in Modern Engineering, Inc. v. CDI Corporation, Civil Action No. 03-5504 U.S. District Court for the Eastern District of Pennsylvania (deposition testimony given and report filed in 2004).

- Deposition Testimony and Expert Reports in Simon Wagman, Ruth Wagman and Richard S. Cohen v. Ronald J. Cohen, et al., Case No.

205147 consolidated with Case No. 206441, Circuit Court of Montgomery County, Maryland (deposition testimony given and reports filed in 2004).

- Expert Reports in Agere Systems, Inc. v. Broadcom Corporation, Case No. 03-3138-BMS, U.S. District Court for the Eastern District of Pennsylvania (reports filed in 2004).

- Expert Report in N. Douglas Fluke v. Heidrick & Struggles, Inc., Civil Action No. 02-8385, U.S. District Court for the Eastern District of Pennsylvania (report filed in 2004).

- Deposition Testimony and Expert Reports in Globe Savings Bank and Phoenix Capital Group v. United States, Civil Action No. 91-1550 C, U.S. Court of Federal Claims (deposition testimony given and reports filed in 2004).

- Trial and Deposition Testimony and Expert Report in Naturopathic Laboratories International, Inc. v. Dermal Research Laboratories, Inc., Case No. 4-02-00604-GAF, U.S. District Court, Western District of Missouri, Western Division (trial and deposition testimony given in 2005; report filed in 2004).

- Deposition Testimony and Expert Report in Capital Funding VI, LP v. Chase Manhattan Bank USA, National Association, Civil Action No. 01-CV-6093, U.S. District Court for

the Eastern District of Pennsylvania (deposition testimony given and report filed in 2004).

- Trial and Deposition Testimony and Expert Reports in Immersion Corporation v. Sony Computer Entertainment America et al., Case No. C-02-0710 CW (WDB), U.S. District Court, Northern District of California, Oakland Division (trial and deposition testimony given and reports filed in 2004).

- Deposition Testimony and Expert Report in Alfred Dana III v. E.S. Originals, Inc. et al., Case No.: 96-6688-CIV-Huck-Turnoff, U.S. District Court, Southern District of Florida (deposition testimony given and report filed in 2004).

- Expert Report in Mylan Pharmaceuticals, Inc. and Esteve Quimica, S.A. v. Kremers Urban Development Company et al., C.A. No. 02-1628-GMS, U.S. District Court for the District of Delaware (report filed in 2004).

- Expert Report in AAI Corporation v. SRN, Inc. et al., Civil No. 03-C-02-012880, Circuit Court for Baltimore County, Maryland (report filed in 2004).

- Deposition Testimony and Expert Report in Sunbeam Products, Inc. v. 148977 Canada, Inc., and Robert Hale, Civil No. C-2002-85666DJ, Circuit Court for Anne Arundel County, Maryland (deposition testimony given and report filed in 2003).

- Expert Report in Ned Bade, et al. v. Lincoln National Corp. and Swiss RE Life & Health America, Inc., Cause No. 02D01-02060CT-258, Allen County Superior Court, State of Indiana (report filed in 2003).

- Trial and Deposition Testimony and Expert Report in Brine, Inc. and Sports Licensing, Inc. v. STX, Inc. and Warrior Lacrosse, Inc., Civil Action No. 99-40167, U.S. District Court, District of Massachusetts, Worcester Division (trial and deposition testimony given and report filed in 2003).

- Trial and Deposition Testimony and Expert Report in Imagexpo LLC v. Microsoft Corporation, Case No. 3:02CU751, U.S. District Court for the Eastern District of Virginia, Richmond Division (trial and deposition testimony given and report filed in 2003).

- Trial and Deposition Testimony in Transcore Holdings v. Rocky Mountain Mezzanine Fund II LP et al., Case No. 1410003193, JAMS Arbitration (trial and deposition testimony given in 2003).

- Expert Report in Pacific International Tool & Shear v. CertainTeed Corporation, Civil Action Case No. CV-020839Z, U.S. District Court, Western District of Washington at Seattle (report filed in 2003).

- Trial and Deposition Testimony and Expert Reports in II-VI, Inc. v. Saint-Gobain Industrial Ceramics, Inc., dba Bicron, Case No. 00-1794 (related to Civil Action No. 98 CV

1528H (CGA), U.S. District Court, Southern District of California), U.S. District Court, Western District of Pennsylvania (trial and deposition testimony given and reports filed in 2003).

- Expert Report in The City of Philadelphia Board of Pensions and Retirement et al. v. Ballard Spahr Andrews & Ingersoll LLP, Confidential Mediation (report filed in 2003).
- Deposition Testimony and Expert Report in Air Turbine Technology, Inc. v. Atlas Copco Tools and Assembly Systems AB, et al., Case No. 01-8288-CIV, U.S. District Court, Southern District of Florida (deposition testimony given and report filed in 2003).
- Deposition Testimony and Expert Report in Turbocare Division of Demag Delaval Turbomachinery Corp. v. General Electric Company, Civil Action No. 95-30069-MAP, U.S. District Court, District of Massachusetts (deposition testimony given in 1996, 1997 and 2003; report filed in 1997).
- Trial Testimony and Expert Report in Brown Manufacturing Corporation v. Alpha Lawn & Garden et al., Case No. 4:02-cv-02951-TLW-TER, U.S. District Court, District of South Carolina, Florence Division (trial testimony given in 2005; report filed in 2003).
- Trial and Deposition Testimony and Expert Report in Sigma Tool & Machine v. Nagayama Electronic Industry Company, Ltd., Case No. 01-cv-02936, U.S. District Court,

District of Columbia (trial and deposition testimony given in 2003; report filed in 2002).

- Deposition Testimony and Expert Report in Oklahoma Medical Research Foundation v. Eli Lilly and Company, Case No. CIV-01-456-C, U.S. District Court, Western District of Oklahoma (deposition testimony given and report filed in 2003).

- Deposition Testimony and Expert Report in Genlyte Thomas Group, LLC v. NSI Enterprises, Inc., d/b/a Lithonia Lighting Co., Civil Action No. 3:00-CV-174-S, U.S. District Court, District of Delaware (deposition testimony given in 2003; report filed in 2002).

- Expert Report in Ecompex, Inc. v. Radian Systems, Inc., Case No. 02-1084-A, U.S. District Court, Eastern District of Virginia (report filed in 2002).

- Trial and Deposition Testimony and Expert Report in NTP, Inc. v. Research in Motion, Ltd., Case No. 3:01cv767, U.S. District Court, Eastern District of Virginia, Richmond Division (trial and deposition testimony given and report filed in 2002).

- Deposition Testimony and Expert Report in Datacom Warranty Corporation v. ABC Communications Corp, d/b/a ABC Telephone Systems, Case No. 1:01-CV-2303-TWT, U.S. District Court, Northern District of Georgia, Atlanta Division (deposition testimony given and report filed in 2002).

- Expert Report in Honeywell International, Inc. and Honeywell Intellectual Properties, Inc. v. Solutia, Inc., Case No. 01-423, U.S. District Court, District of Delaware (report filed in 2002).

- Trial and Deposition Testimony and Expert Report in Accucorp, Inc. and J.W.S. Delavau Company, Inc. v. Kalish, Inc., Case No. 01-cv-592, U.S. District Court, Eastern District of Pennsylvania (trial and deposition testimony given in 2002; report filed in 2001).

- Deposition Testimony and Expert Report in Structural Preservation Systems, Inc. v. Gerald Valente, Case No. C-1999-60027CN, Circuit Court of Maryland for Anne Arundel County (deposition testimony given and report filed in 2002).

- Deposition Testimony and Expert Report in D&N Bank, et al. v. United States of America, Civil Action No. 95-539-C, U.S. Court of Federal Claims (deposition testimony given in 2002; report filed in 2001).

- Deposition Testimony and Expert Report in Hill-Rom, Inc. and Hill-Rom Services, Inc. v. Ohmeda Medical and Datex-Ohmeda, Inc., Civil Action No. IP00-1500-C Y/G, U.S. District Court, Southern District of Indiana (deposition testimony given and report filed in 2002).

- Trial and Deposition Testimony and Expert Reports in Granite Management Corporation v. United States of America, Civil Action No.

95-515-C, U.S. Court of Federal Claims (trial and deposition testimony given and supplemental report filed in 2006; deposition testimony given and report filed in 2002).

- Expert Report in Becton Dickinson and Company v. Inverness Medical Technology, Inc., Civil Action No. 00-001-RRM, U.S. District Court, District of Delaware (report filed in 2002).

- Deposition Testimony and Expert Report in Superguide Corporation v. Directv Enterprises, Inc., Echostar Communications Corporation, et al., Case No. 00-144T, U.S. District Court, Western District of North Carolina, Asheville Division (deposition testimony given in 2002; report filed in 2001).

- Deposition Testimony and Expert Report in David Cain, et al. and the Federal Deposit Insurance Corporation (FDIC) v. United States, Case No. 95-499C, U.S. Court of Federal Claims (deposition testimony given in 2002; report filed in 2001).

- Trial Testimony and Expert Report in Nisus Corporation v. Perma-Chink Systems, Inc., Case No 3:98-CV-433, U.S. District Court, Eastern District of Tennessee, Knoxville Division (trial testimony given in 2005; report filed in 2001).

Bankruptcy Cases

- Trial Testimony, Expert Report and Declaration in re: Bob Nicholas Enterprises, Inc.

(Debtor), W. Steve Smith, Trustee of the Estate of Bob Nicholas Enterprises, Inc. v. Nicholas/Earth Printing, LLC, et al., Bankruptcy Case No. 03-39036-H1-7, U.S. Bankruptcy Court, Southern District of Texas (Houston Division) (trial testimony given and declaration and report filed in 2006).

- Hearing Testimony and Declaration in re: Medical Technology, Inc., d/b/a Bledsoe Brace Systems (Debtor), Bankruptcy Case No. 05-47377-RFN-11, U.S. Bankruptcy Court, Northern District of Texas, Fort Worth Division (hearing testimony given and declaration filed in 2005).
- Deposition Testimony and Expert in re: Merry-Go-Round Enterprises, Inc., MGR Distribution Corporation, MGRR, Inc. and Almeda Chess King, Inc., et al., Bankruptcy Case Nos. 94-50161 through 94-50163 and 94-53774; Deborah H. Devan, Chapter 7 Trustee v. AEI Music Networks, Inc., Adversary No. 98-5336, U.S. Bankruptcy Court, District of Maryland, Northern Division (deposition testimony given in 2004; reports filed in 2003).
- Deposition Testimony and Expert Report in re: Nelco, Ltd.; Estate of Nelco, Ltd. v. KPMG Peat Marwick, LLP, Adversary Proceeding No. 99-3109-T, U.S. Bankruptcy Court, Eastern District of Virginia, Richmond Division (deposition testimony given in 2002; report filed in 2001).

Last updated 3.5.07

Exhibit C

NW Austin Municipal Utility District No:1 v. Alberto Gonzales, Attorney General of the US, et al.
Financial Reporting History of the District From 1989 Through 2005

Year	Type of Financial Document Available	Source
1989 (Sep-30)	Audited general purpose financial statements and Supplemental Information	P009522-60
1990 (Sep-30)	General Fund and Debt Service Fund Revenues & Expenditures	Note 1
1991 (Sep-30)	Audited general purpose financial statements and Supplemental Information	Attachment to Official Statement, Series 1992
1992 (Oct-20)	Schedule of costs and Independent Accountant's Report Concerning $2.7 Series 1992 bonds	P000349-58
1993 (Sep-30)	Audited general purpose financial statements and Supplemental Information	P000714-46
1994 (Sep-30)	General Fund and Debt Service Fund Revenues & Expenditures	Note 2
1995 (Sep-30)	Audited general purpose financial statements, Supplemental Information and Single Audit Section	P002440-98
1996 (Sep-30)	Audited general purpose financial statements, Supplemental Information and Single Audit Section	Attachment to Official Statement, Series 1997
1997 (Sep-30)	Audited general purpose financial statements and Supplemental Information	P003499-541
1998 (Sep-30)	Audited general purpose financial statements and Supplemental Information	P003195-236
1999 (Sep-30)	Audited general purpose financial statements and Supplemental Information	P002828-68
2000 (Sep-30)	Audited general purpose financial statements and Supplemental Information	P004536-75
2001 (Sep-30)	Audited general purpose financial statements and Supplemental Information	P008400-40
2002 (Sep-30)	Audited general purpose financial statements and Supplemental Information	P005170-217
2003 (Sep-30)	Audited general purpose financial statements and Supplemental Information	Attachment to Official Statement, Series 2004
2004 (Sep-30)	General Fund and Debt Service Fund Revenues & Expenditures	Note 3
2005 (Sep-30)	Audited general purpose financial statements and Supplemental Information	P007778-818

Notes:

1/ Audited financial statements not available but General Fund and Debt Service Fund Revenues & Expenditure available as an attachment to the Official Statement for issuing Unlimited Tax Bonds, Series 1994.

2/ Audited financial statements not available but General Fund and Debt Service Fund Revenues & Expenditure available as an attachment to the Official Statement for issuing Unlimited Tax Refunding Bonds, Series 1998.

3/ Audited financial statements not available but General Fund and Debt Service Fund Revenues & Expenditure available as a comparative schedule in the Audited financial statements for 2005 (P007815).

NW Austin Municipal Utility District No:1 v. Alberto Gonzales, Attorney General of the US, et al. Exhibit D

District's Pre-Clearance Submissions under Section 5 of the VRA

Pre-Clearance Submission #	Date Submitted	Type of Submission
1986-1537	11/25/1986	Creation, Polling place, Bilingual Election Procedure
1988-1404	3/21/1988	Polling place
1990-1423	3/6/1990	Polling place
1996-1732	4/4/1996	Polling place
1996-2595	6/6/1996	Notice & Cancellation of Election
1998-1264	3/26/1998	Polling place, Annexation
2002-1980	3/27/2002	Polling place
2004-0946	2/26/2004	Polling place, Early voting, Electronic ballot

Source:
NW Austin MUD No.1 submissions to Civil Rights Division, DOJ.

NW Austin Municipal Utility District No:1 v. Alberto Gonzales, Attorney General of the US, et al.
Revenues and Expenditures of the District – 1989 through 2005

Exhibit E

	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	1989-2005 Average
General Fund Revenues																		
Water and wastewater services, including penalties	$ 31,594	$ 91,010	107,479	$ –	$ –	$ –	$ –	$ –	$ –	$ –	$ –	$ –	$ –	$ –	$ –	$ –	$ –	13,534
Tax revenues, including penalties	–	39,224	65,564	102,150	146,034	21,537	135,898	117,725	125,032	136,543	160,234	123,503	141,505	161,683	138,211	175,615	135,782	113,310
Tap fees	112,775	182,450	166,825	45,100	56,950	49,975	38,850	40,425	40,069	63,175	53,025	72,450	5,250	22,575	18,900	25,200	48,825	61,342
Interest	3,006	24,418	29,510	13,994	12,675	14,709	11,965	12,552	10,522	13,458	19,768	30,417	31,401	14,051	9,645	9,011	22,481	16,681
Developer contribution	70,408	19,103	–	–	224,000	–	2,200	–	–	–	–	–	–	–	–	–	–	18,571
Intergovernmental	–	–	–	–	–	–	391,678	108,322	–	–	–	–	–	–	–	–	–	29,412
Seal of easement	–	–	–	–	–	–	–	–	–	50,000	–	8,500	–	–	–	–	–	3,441
Miscellaneous	330	5,249	–	952	–	–	–	–	883	–	750	–	–	1,984	928	900	1,849	813
Other Financing Sources	–	–	–	–	–	–	150,737	34,624	–	–	–	–	–	–	–	–	–	10,904
Total General Fund Revenues	218,113	361,454	369,378	162,196	439,659	86,221	731,328	313,648	176,506	263,176	233,777	234,870	178,156	200,293	167,684	210,756	208,937	268,009
General Fund Expenditures																		
Current																		
Water and wastewater purchases	43,298	31,178	60,177	16,498	–	–	–	–	–	–	–	–	–	–	–	–	–	8,991
Sewer tap	42,000	66,750	63,600	39,725	20,300	52,325	38,850	99,050	9,450	3,850	–	–	–	–	–	–	–	25,641
Inspection fees	5,123	8,891	6,842	331	–	–	–	–	–	–	–	–	–	–	–	–	–	1,246
Repairs and maintenance	665	40,057	46,111	24,319	24,794	33,354	33,609	53,428	46,995	17,676	17,507	23,949	27,937	39,166	34,751	36,276	39,998	31,817
Joint water facility	–	65,459	49,123	48,320	–	–	–	–	–	–	–	–	–	–	–	–	–	9,582
Legal fees	4,388	41,004	22,445	27,862	21,246	24,672	26,804	29,478	25,078	29,485	25,117	25,401	29,289	33,388	49,088	45,807	50,405	30,056
Engineering fees	–	33,365	7,519	17,608	16,446	11,458	11,486	10,231	13,252	10,867	13,268	15,006	15,923	13,645	4,187	3,389	2,996	11,803
Management services	5,000	13,877	16,283	10,129	10,444	10,264	10,181	10,183	10,256	10,094	10,352	12,935	13,634	13,698	13,781	13,645	13,838	11,682
Auditing fees	–	6,000	7,292	6,036	5,971	6,200	8,250	9,000	11,000	7,000	7,000	7,400	7,500	7,800	8,000	7,500	10,000	7,173

Insurance	–	4,207	3,892	3,976	3,982	3,981	3,976	3,857	3,823	3,700	4,535	4,790	4,790	2,710	2,771	2,772	1,523	3,487
Miscellaneous	638	3,552	3,188	1,168	1,619	2,517	2,074	12,027	2,577	3,290	668	834	2,059	7,231	5,007	5,625	1,484	3,268
Director fees	800	1,950	2,450	2,950	3,100	3,150	3,950	6,700	5,900	7,400	5,700	7,105	5,813	6,890	5,529	5,921	8,720	4,943
Election expense	–	–	–	2,166	–	–	–	–	–	–	–	–	–	–	–	–	–	127
Electricity	–	1,589	1,844	–	–	–	–	–	–	–	–	–	–	–	–	–	–	202
Other professional fees	–	1,546	–	–	–	–	–	–	–	–	–	–	–	1,389	14,650	5,233		1,342
Lab fees	–	–	819	–	–	–	–	–	–	–	–	–	–	–	–	–	–	48
Bad debt	–	–	2,186	–	–	–	–	–	–	–	–	–	–	–	–	–	–	129
Tax appraisal/ collection fees	–	–	715	1,036	1,316	616	1,204	1,568	933	959	1,101	848	989	1,108	910	3,924	704	1,055
Capital Outlay	–	–	–	14,509	73,885	41,027	562,723	232,822	–	1,729	22,304	–	–	8,021	1,973	–	23,235	57,778
Transfer out	–	–	–	–	144,574	–	11,004	–	–	–	–	–	–	–	–	–	–	9,152
Total General Fund Expenditure	101,912	319,425	294,486	216,633	327,677	189,564	714,111	468,344	129,264	96,050	107,552	98,268	107,934	135,346	140,647	130,092	152,903	219,424
Excess (Deficiency) of General Fund Revenues Over Expenditures	116,201	42,029	74,892	(54,437)	111,982	(103,343)	17,217	(154,696)	47,242	167,126	126,225	136,602	70,222	64,947	27,037	80,664	56,034	48,585
Annual Debt Service Interest Expense (Exhibit G)	–	–	–	–	166,910	182,080	286,375	321,140	321,140	389,628	284,255	379,896	402,561	634,751	730,247	731,967	760,583	
																		328,914
District's Total Expenditure (Total General Fund Expenditure & Debt Service Interest Expense 1989-2005)																		$ 548,338

Source: General Fund Revenues and Expenditures compiled from the Attachments to Official Statements for bond issuance.

NW Austin Municipal Utility District No:1 v. Alberto Gonzales, Attorney General of the US, et al. **Exhibit F**

Estimated Section 5 Expenditure for the 8 Submissions since 1986

Year	1/ Pre-Clearance Submission #	1/ Date Submitted	1/ Type of Submission	Est. Sec. 5 Expenditure
1986	1986-1537	11/25/1986	Creation, Polling place, Bilingual Election Procedure	$ 340 2/
1987	n/a	n/a	n/a	-
1988	1988-1404	3/21/1988	Polling place	340 2/
1989	n/a	n/a	n/a	-
1990	1990-1423	3/6/1990	Polling place	340 2/
1991	n/a	n/a	n/a	-
1992	n/a	n/a	n/a	-
1993	n/a	n/a	n/a	-
1994	n/a	n/a	n/a	-
1995	n/a	n/a	n/a	-
1996	1996-1732	4/4/1996	Total 3/	764 2/
1997	n/a	n/a	n/a	-
1998	1998-1264	3/26/1998	Polling place, Annexation	1,242 2/
1999	n/a	n/a	n/a	-
2000	n/a	n/a	n/a	-
2001	n/a	n/a	n/a	-
2002	2002-1980	3/27/2002	Polling place	484 2/
2003	n/a	n/a	n/a	-
2004	2004-0946	2/26/2004	Polling place, Early voting, Electronic ballot	953 4/
2005	n/a	n/a	n/a	-
Total Estimated Section 5 Expenditure				$ 4,463
Average Annual Section 5 Expenditure Over the Life of the District				$ 223 5/
Average Estimated Sec.5 Expense as a % of Average General Fund Expenditure Plus Debt Service Interest from Inception Through 2005				0.04% 6/

Source & Notes:

1/ NW Austin MUD No.1 submissions to Civil Rights Division, United States DOJ.

2/ Estimate of time spent on the first seven Section 5 pre-clearance submissions based on deposition testimony of Sharlene Collins of 2 hours for polling place submissions and 6 hours when it included annexation work. Ms. Collins actual billing rate in an invoice dated March 11, 1993 was $170. She testified that "I charge most of my MUD clients at least my older ones, $295 an hour." (Collins deposition Volume 2 at p58). This represents an annual rate of increase in Collins' billing rate of 4.02%. For submissions after 1993, I arrived at her billing rate using the derived rate of increase. For the first three submissions before 1993, I have conservatively used the $170 rate without any downward adjustment.

3/ Total of two submissions made in 1996 is $768:

#1996-1732 submitted on 4/4/96 for Polling Place change – $384

#1996-2595 submitted on 6/6/96 for Notice & Cancellation of Election – $384

4/ Estimate of the cost of the 2004 submission based on the February 29, 2004 invoice submitted by Potts & Reilly, LLP. Ms. Qualtrough and and [sic] Mr. Reilly's time spent on Sec. 5 submissions each day have been estimated from their total time billed to the District on those days using the descriptions provided by them in the invoice:

Ms. Qualtrough – 2/10 – 1 hour; 2/11 – 0.5 hours; 2/16 – 1.6 hours; 2/22 – 0.5 hours; 2/24 – 0.65 hours; 2/25 – 0.3 hours; 2/26 – 0.45;

Total – 4.65 hours; Actual billing rate $175. Therefore, cost of Ms. Qualtrough's time = $875

Mr. Reilly – 2/16 – 0.4 hours; Actual billing rate – $195. Therefore, cost of Mr. Reilly's time – $78

Total cost of Section 5 submission = $875 + $78 = $953

Even if Ms. Qualtrough's and Mr. Reilly's time was overstated by considering all their time spent on the specific days, it would only be a total of 17.5 and 0.8 hours respectively i.e. $3,218.5 or 0.59% of Average of General Fund Expenditure Plus Debt Service Interest Expense over the 1989-2005 period.

5/ 1986-2005 (20 years).

6/ $629 (Exhibit F) / $548,338 (Exhibit E).

NW Austin Municipal Utility District No:1 v. Alberto Gonzales, Attorney General of the US, et al. Exhibit G

Annual Outstanding Debt and Debt Service from 1989 through 2005

Year	Outstanding Debt	Annual Debt Service			Source
		Principal Retirement	Interest	Other	
1989	-	-	-	-	1/
1990	-	-	-	-	2/
1991	-	-	-	-	3/
1992	-	-	-	-	4/
1993	2,700,000	-	166,910	600	4/
1994	2,700,000	-	182,080	600	5/
1995	4,700,000	-	286,375	1,712	5/
1996	4,700,000	-	321,140	1,465	6/
1997	6,040,000	60,000	321,140	700	7/
1998	6,532,899	90,000	389,628	1,552	8/
1999	8,244,352	225,000	284,255	4,886	9/
2000	7,988,941	295,000	379,896	1,434	10/
2001	13,430,304	310,000	402,561	2,034	11/
2002	12,972,898	340,000	634,751	1,834	12/
2003	12,143,029	245,745	730,247	1,834	13/
2004	12,492,772	232,457	731,967	-	14/
2005	12,239,187	216,476	760,583	122,684	14/

Source:

1/ P009540.
2/ Financial statements not available put presumed to be Zero based on 1992 amounts.
3/ Attachment to Official Statement, Series 1992.
4/ P000718, P000719 and P000726
5/ P002446, P002447
6/ Attachment to Official Statement, Series 1997.

7/ P003504-P003506.
8/ P003200-P003201.
9/ P002833-P002834.
10/ P004541-P004542.
11/ P008404-P008405.
12/ P005178-P005180.
13/ Attachment to Official Statement, Series 2004.
14/ P007787-P007788, P007796 and P007815.

Exhibit H

NW Austin Municipal Utility District No:1 v. Alberto Gonzales, Attorney General of the US, et al.
List of Documents Relied Upon

Title	Date	Alpha	Low	High
Deposition transcript of Sharlene Collins (rough draft)				
Deposition transcript of Sharlene Collins Volume 2 (rough draft)				
Deposition transcript of Donald Shelly Zimmerman (rough draft)				
Deposition transcript of Kerrie Jo Qualtrough (rough draft) – 02/26/07				
Deposition transcript of Mr. Reilly (rough draft)				
Deposition transcript of Dana Debeauvoir – 02/26/07				
Deposition transcript of William Ferguson – 02/20/07				
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	July 16, 1991	P	158	185
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	September 10, 1991	P	98	148
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	October 15, 1991	P	64	97
Statement of Revenue and expenses – 12/1/90 to 12/31/90		P	260	282
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	October 20, 1992	P	341	358
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	February 16, 1993	P	999	1014
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	March 23, 1993	P	941	998
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	December 21, 1993	P	702	770
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	February 15, 1994	P	1422	1460
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	September 26, 1994	P	1202	1221
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	November 15, 1994	P	1130	1162
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	January 5, 1995	P	1729	1843
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	July 18, 1995	P	2018	2055
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	November 14, 1995	P	1863	1900
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	January 16, 1996	P	2432	2508
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	April 8, 1997	P	4041	4076
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	October 14, 1997	P	3774	3795
Exhibits C-F Financial Statements		P	3489	3559
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	July 14, 1998	P	3693	3730
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	September 15, 1998	P	3603	3624
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	January 12, 1999	P	3186	3250
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	January 11, 2000	P	2820	2881
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	March 14, 2000	P	2711	2792
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	June 13, 2000	P	2630	2653

Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	July 11, 2000	P	2621	2629
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	January 9, 2001	P	4528	4601
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	September 11, 2001	P	4256	4280
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	March 21, 2003	P	5121	5237
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	August 14, 2003	P	5518	5582
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	November 13, 2003	P	5356	5398
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	February 19, 2004	P	6127	6209
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	May 6, 2004	P	4879	4961
Minutes of Meeting of Board of Directors of NW Austin MUD NO. 1	July 8, 2004	P	4757	4815
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Complaint	n/a	n/a	n/a	n/a
Scheduling Order	n/a	n/a	n/a	n/a
Private Defendant-Intervenors' Joint First Set of Requests for Production of Documents to Plaintiff	n/a	n/a	n/a	n/a
Private Defendant-Intervenors' Joint First Set of Interrogatories to Plaintiff	n/a	n/a	n/a	n/a

11/25/86 Section 5 Submission No 1986-1537	n/a	n/a	n/a	n/a
03/21/88 Section 5 Submission No 1988-1404	n/a	n/a	n/a	n/a
03/06/90 Section 5 Submission No 1990-1423	n/a	n/a	n/a	n/a
04/04/96 Section 5 Submission No 1996-1732	n/a	n/a	n/a	n/a
05/30/96 Phone Commission Memo between Collins and DOJ	n/a	n/a	n/a	n/a
06/03/96 letter from DOJ to Collins re 04/05/96 Section 5 Submission	n/a	n/a	n/a	n/a
06/06/96 Section 5 Submission No 1996-2595	n/a	n/a	n/a	n/a
06/27/96 Phone Communication Memo between Collins and DOJ	n/a	n/a	n/a	n/a
08/01/96 letter from DOJ to Collins re 06/10/96 Section 5 Submission	n/a	n/a	n/a	n/a
03/26/98 Section 5 Submission no 1998-1264	n/a	n/a	n/a	n/a
05/19/98 Letter from DOJ to Armburst re Annexation adopted 04/14/97	n/a	n/a	n/a	n/a
03/21/02 Section 5 Submission No 2002-1980	n/a	n/a	n/a	n/a
05/24/02 Letter from DOJ to Armburst re Polling Place Change	n/a	n/a	n/a	n/a
02/26/04 Section 5 Submission No 2004-0946	n/a	n/a	n/a	n/a
03/18/04 Phone Communication Memo between Qualtrough and DOJ	n/a	n/a	n/a	n/a
04/08/04 Letter from DOJ to Qualtrough re Polling Place Change	n/a	n/a	n/a	n/a
Invoice dated February 29, 2004 from Potts & Reilly, L.L.P.	n/a	n/a	n/a	n/a
Northwest Austin MUD #1 – Approved Budget 2005-2006	n/a	n/a	n/a	n/a
Federal Register, Vol. 40, No. 185.	n/a	n/a	n/a	n/a
Official Statement, Northwest Austin Municipal Utility District, Unlimited Tax Bonds, Series 1992	n/a	n/a	n/a	n/a
Official Statement, Northwest Austin Municipal Utility District, Unlimited Tax Bonds, Series 1994	n/a	n/a	n/a	n/a
Official Statement, Northwest Austin Municipal Utility District, Unlimited Tax Bonds, Series 1997	n/a	n/a	n/a	n/a
Official Statement, Northwest Austin Municipal Utility District, Unlimited Tax Refunding Bonds, Series 1998	n/a	n/a	n/a	n/a
Official Statement, Northwest Austin Municipal Utility District, Unlimited Tax Bonds, Series 1999	n/a	n/a	n/a	n/a
Official Statement, Northwest Austin Municipal Utility District, Unlimited Tax Bonds, Series 2001	n/a	n/a	n/a	n/a
Official Statement, Northwest Austin Municipal Utility District, Unlimited Tax Refunding Bonds, Series 2004	n/a	n/a	n/a	n/a
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"The Politicization of Justice Department/Decisionmaking Under Section 5 of the Voting Rights Act: Is it a Problem and What should Congress Do?", By Mark A. Posner	n/a	n/a	n/a	n/a
"Public Citizen Fights for Minority Rights, Defends Voting Rights Act Against Texas Legal Challenge", By Emma Cheuse	n/a	n/a	n/a	n/a
Statement of Bradley Schlozman of Acting Asst. Attorney Gen. Civil Right Division Department of Justice Before The Subcommittee On The Constitution Committee On The Judiciary U.S. House of Representatives Concerning The Voting Rights Act: Section 5 Of The Act-History, Scope, and Purpose	n/a	n/a	n/a	n/a
Oversight Hearing on "Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act", Statement of J. Gerald Hebert	n/a	n/a	n/a	n/a
U.S. Commission on Civil Rights Briefing Report April 2006: Reauthorization of the Temporary Provisions of the Voting Rights Act	n/a	n/a	n/a	n/a
Congressional Power to Extend Pre-clearance Under the Voting Rights Act, By Pamela S. Karlat 446 U.S. 156, 100 S.Ct. 1548	n/a	n/a	n/a	n/a
NW MUD District No. 1 Fact Sheet Budget Year 2005/2006 from www.nwamud.com	n/a	n/a	n/a	n/a
Congressional Power to Renew the Pre-clearance Provisions of the Voting Rights Act After Tennessee v. Lane by Richard L. Hasen	n/a	n/a	n/a	n/a
"Voting Wrongs", By Quin Hillyer <http://www.spectator.org>	n/a	n/a	n/a	n/a
H.R. 9 To Amend the Voting Rights Act of 1965	n/a	n/a	n/a	n/a
http://www.usdoj.gov/crt/voting/notices/vnote032902.html	n/a	n/a	n/a	n/a
http://judiciary.senate.gov/print_testimony.cfm?id=1955&wit_id=5464	n/a	n/a	n/a	n/a
http://www.aclu.org/votingrights/gen/26259prs20060727.html	n/a	n/a	n/a	n/a
http://www.usdoj.gov/crt/voting/sec_5/making.htm	n/a	n/a	n/a	n/a
http://www.usdoj.gov/crt/voting/sec_5/about.htm	n/a	n/a	n/a	n/a
http://voterlaw.com/press08312006.htm	n/a	n/a	n/a	n/a
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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701	)	
Plaintiff,	)	CIVIL ACTION NO.
v.	)	1:06-CV-01384 (DST, PLF, EGS)
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

* *

ORAL DEPOSITION OF
WINTHROP GRAHAM
Wednesday, April 25, 2007

* *

ORAL DEPOSITION OF WINTHROP GRAHAM, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 25th day of April, 2007, from 8:01 p.m. to 8:34 p.m., before RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Yetter & Warden, LLP, 221 W. 6th Street, Suite 750, Austin, Texas 78701 pursuant to

the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

[2] APPEARANCES

FOR THE PLAINTIFF NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NO. ONE:

Mr. Christian Ward
YETTER & WARDEN, LLP
221 West Sixth Street, Suite 750
Austin, Texas 78701 (512) 743-2642

FOR THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION:

Mr. Chris Herren (By telephone)
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FOR LDF:

Mr. Ryan Paul Haygood
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99 Hudson Street, Suite 1600
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(No exhibits were marked during this deposition)

[4] WINTHROP GRAHAM,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. WARD:

Q. Okay. Mr. Graham, thank you for coming here tonight. I have introduced you to myself once. I'm Chris Ward and I am here representing the Northwest Austin Municipal Utility District No. 1.

A. Okay.

Q. Just for the record, during this deposition if I refer to the district or the MUD, that's the district I'm going to be referring to.

A. Okay.

Q. Do you understand that? And you have given the court reporter your full name. Can you please state your address on the record for me?

A. It's 9700 Indigo Brush Drive, Austin, Texas 78726.

Q. And is that address inside the district?

A. Yes, it is.

Q. Okay. And how long have you lived there?

A. Since 1997, I think.

Q. And – and where did you live before that?

A. I lived in a subdivision called Wells Branch.

Q. Okay. And – and that is not within the [5] district. Is that correct?

A. That's – that's a little bit closer to 1-35.

Q. Okay. And that – that is in Austin, though.

A. It's in Austin.

Q. Correct?

A. Yeah.

Q. Okay. Did you live anywhere else before you came to Austin?

A. I lived in Arizona for one year. I went to school there. And before that I lived in Jamaica.

Q. And what school did you attend in Arizona?

A. Central Arizona.

Q. And have you done anything to prepare for this deposition today?

A. Not – no, not – don't think there was anything I needed to do, really.

Q. Okay. Did you review any documents?

A. Just some – no, not really, just documents about the – the case was resolved, I guess – not resolved, but I guess just a letter just saying they might have come to an agreement, something like that. I wasn't sure what it was. But it was, you know, a simple letter.

Q. Okay. Did you bring any documents with you to the deposition?

[6] A. No, I didn't. What form of documents are you talking about?

Q. Well, in our – our deposition notice we requested that you bring any documents that you might have reviewed in preparation or that might have relevant information –

A. Oh, okay.

Q. – to the case. But – but you don't have any documents –

A. No, I don't.

Q. – of that type. Okay. Would you say that you are involved in your community?

A. I'm involved in a lot of different ways, I think.

Q. Okay. What are some of those ways?

A. Owner of small business in the community. Volunteer at the schools different ways. Help give advice to different, you know, groups. So just different things like that I'm involved.

Q. And do you vote?

A. I voted once since I lived in that district.

Q. Okay. When was that?

A. Not a hundred percent sure, but I think perhaps '99 or somewhere around there. Or 2000. Somewhere around that time. I'm not a hundred percent [7] sure about the time.

Q. Okay. Would you consider yourself to be an active voter?

A. Not necessarily. Not at the moment. Because if I see a person – see that can, you know, voice my views or whatever, I think I would.

Q. So – so you vote when a candidate appeals to you?

A. Yes. I vote when a candidate appeals.

Q. But if – if no one is sparking your interest, then you don't necessarily feel the need to go and vote?

A. No.

Q. Okay. The election that you voted in in the district in – you said either '99 or 2000, was that one of the elections for the district's board?

A. Not hundred percent sure, to be honest with you, if it was for the board or for the – you know, it was a lot of different things you could vote for.

Q. Okay. Do you remember if that was a – a local election or maybe a federal election?

A. I think they had – if I remember correctly, I think they had both. I think it was like a local – you had the local you could vote for or something like that, running for office, and then others.

[8] Q. Okay. Was it – do you remember if it was the presidential election of 2000?

A. It could be. I think it could be 2000.

Q. Okay. Was it in the fall or the spring?

A. It was so long ago, I can't remember. I don't really remember, to be honest, exactly what time of year it was.

Q. Okay. So do you remember, though, if the – the MUD board elections were on that ballot?

A. I – I am not going to swear, but I think a lot of different things was on the ballot. There was a lot of different things. You had – gave you choices to vote

for. This represented this, this represented – I can't remember exactly all that was on it, to be honest.

Q. And did you experience any problems voting in that election?

A. Not really. It was simple.

Q. So have you – do you have any information about how the MUD itself conducts its elections for its board?

A. I don't know the details about that, to be honest. I do know they run for offices but I don't know – you know, I'm not into politics too much like that, so I don't really know, to be honest, sir.

[9] Q. Okay. So is it fair to say that you're – you have no specific complaint about how the MUD's elections have been run?

A. How the election have been run?

Q. Yes.

A. No. No, because I don't follow in that detail.

Q. Okay. Okay. So it's fair to say you don't have a specific complaint about the MUD's elections.

A. About the election itself, not really – not at the moment, no.

Q. Okay. Do you attend board meetings of the MUD?

A. No.

Q. Okay. Have you ever attended any?

A. No.

Q. Okay. Do you attend meetings of the homeowners association in Canyon Creek?

A. Yeah, those I have attended.

Q. Okay. Do you attend those on a regular basis?

A. I wouldn't say on a regular basis, but I have attended.

Q. Okay. Do you get the Canyon Creek homeowners association newsletter?

A. Yes. I do.

* * *

[30] PAGE LINE CHANGE REASON CODE

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_____

WINTHROP GRAHAM

THE STATE OF _____)
)
COUNTY OF _____)

Before me, _____, on this day personally appeared WINTHROP GRAHAM, known to me (or proved to me under oath or through

_____

(description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of May 2007.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF _____

[31] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff,	)	CIVIL ACTION NO.
v.	)	1:06-CV-01384 (DST,PLF,EGS)
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

REPORTER'S CERTIFICATION
DEPOSITION OF WINTHROP GRAHAM
Wednesday, April 25, 2007

I, RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, WINTHROP GRAHAM, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on May 3, 2007 to the witness or to the attorney for the

witness for examination, signature and return to me by _____, 2007.

That the amount of time used by each party at the deposition is as follows:

[32] Mr. Gregory S. Coleman – 27 minutes
Mr. Ryan Paul Haygood – 10 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Christian Ward, attorney for Plaintiff Mr. Carlos Becerra, attorney for MALDEF

Mr. Chris Herren and Ms. Christy A. McCormick, attorneys for U.S. Department of Justice

Mr. Benjamin Blustein, attorney for Lawyers' Committee for Civil Rights Under Law

Mr. Daniel A. Zibel, attorney for NAACP

Mr. Max Renea Hicks, attorney for Travis Cty.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 3rd day of May, 2007.

RANDALL N. FINCH, Texas CSR #504
Expiration date: 12/31/2008
Fredericks-Carroll Reporting
Firm Registration No. 82
7800 Shoal Creek Blvd., Suite 200-W
Austin, Texas 78757 (512) 477-9911

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701	)	
Plaintiff,	)	CIVIL ACTION NO.
v.	)	1:06-CV-01384 (DST, PLF, EGS)
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

* *

ORAL DEPOSITION OF
YVONNE GRAHAM
Wednesday, April 25, 2007

* *

ORAL DEPOSITION OF YVONNE GRAHAM, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 25th day of April, 2007, from 8:35 p.m. to 9:07 p.m., before RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Yetter & Warden, LLP, 221 W. 6th Street, Suite 750, Austin, Texas 78701 pursuant to

the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

[2] APPEARANCES

FOR THE PLAINTIFF NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NO. ONE:

Mr. Christian Ward
YETTER & WARDEN, LLP
221 West Sixth Street, Suite 750
Austin, Texas 78701 (512) 743-2642

FOR THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION:

Mr. Chris Herren (By telephone)
Attorney at Law
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(202) 327-3961 Fax

FOR LDF:

Mr. Ryan Paul Haygood
Assistant Counsel
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New York, New York 10013 (212) 965-2235
(212) 226-7592 Fax

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DEPOSITION EXHIBITS

(No exhibits were marked during this deposition)

[4] YVONNE GRAHAM,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. WARD:

Q. Mrs. Graham, thank you for coming tonight. As I told you before, my name is Chris Ward and I represent the Northwest Austin Municipal Utility District No. 1, which I will refer to – if I refer to the MUD or the district during this deposition, that's the district I'll be referring to.

Will you please state for the record your address.

A. 9700 Indigo Brush Drive, Austin, Texas 78726.

Q. And is that address within the district?

A. Yes.

Q. And how long have you lived there?

A. It's almost 13 years, I would say. Twelve. Twelve, 13 years.

Q. And where did you live before that?

A. We lived in Wells Branch. And before that – I am from Germany; I lived in Germany.

Q. Okay. So before you lived in the district you lived in Austin for a while but not inside the district. Is that correct?

A. I came here '91 and lived in Wells Branch [5] first, and then we moved to Canyon Creek.

Q. Okay. Have you done anything to prepare for this deposition?

A. Well, of course, the complicated legal issue Ryan can address. My point of view is I – I heard from a friend that MUD is – I say it in my words, trying to detach themselves from the Voting Right Act, basically. No jurisdiction really can overlook what's really doing, and from my point of view, my first thing was there's something to hide, other than maybe even devious reasons or even selfish reasons.

You got to understand I'm from Germany. So to me, like the safety switch is missing. If you can report to other groups or if you can have other people say an opinion – I mean, like two eyes more – two pair of eyes see more than one pair. Three more than two. And since the MUD is still a small group, they kind of

get isolated, maybe not on purpose, doing decisions that to me may be not right.

So I think it's – it's much safer you have a big group overlooking things, other jurisdictions making decision or intervene if something doesn't sound right. And, I mean, like history – history tells us in decisions like that, always the minority are the ones that get hurt. And eventually

* * *

[14] A. Well, there's actually just – no, I'm very stubborn. Prove to me even if it's most, it doesn't have to be right. Common sense tells me it's better you overlook it, somebody overlook it.

Q. So do you feel that it would be best if the whole country was under this part where they have to go to the federal government for approval?

A. Well, it depends. When you have maybe an area where there is a complete mix, which is impossible in the U.S., a complete mix, white, blacks, Hispanic, same proportion, it may be not necessary. Do you understand what I'm saying?

MR. HAYGOOD: Mm-hmm.

THE WITNESS: It's just I think the diversity makes it work better. It does – it wouldn't work where am I because of the majority of white people. The majority of how people think. I mean, I can feel it. I – you know, I come from a country where I was even more a minority than in the U.S. and I did not

feel there like I feel here. Like I feel even in the neighborhood.

A lot of people know – know us now because we are very long in the neighborhood. We have four kids in the neighborhood. But I still have quite some people, they look at me a certain way and I can [15] feel, you know, "What is she doing here?" I am in the park with my kids, "Do you live here?" You know, like, yes, I live here, for a long time. Probably longer than you all. You know, and I work hard for that. And I pay my taxes. Okay?

So – so therefore, I am here. I think there is still a lot going on that has to be solved and I don't think it's helpful when this MUD would separate.

Q. (By Mr. Ward) Do you understand that aside from the part of the Voting Rights Act that is involved in this lawsuit, other parts of the Voting Rights Act cover the whole country, and I –

A. So you only partially moved away from the Voting Rights Act? Is this –

MR. HAYGOOD: Just let him ask that question.

THE WITNESS: Huh?

MR. WARD: Yeah, let –

MR. HAYGOOD: Let him ask the question.

MR. WARD: Let me – let me try –

THE WITNESS: Okay.

Q. (By Mr. Ward) Let me try to – let me – if I – let me try to start that question over again. Do you understand that part of the Voting Rights Act [16] permits any government in the country to be sued if someone thinks there's voting discrimination?

MR. HAYGOOD: It's – I – I object to that question because I think it calls for a legal conclusion and also because I don't think it's relevant. But you can answer it if you can.

THE WITNESS: Yeah, and I probably could not honor this question anyway. It's just – yeah.

Q. (By Mr. Ward) Okay. I'm – I'm not – in these questions I'm not really asking for your legal conclusion.

A. No, no.

Q. But I'm – but I'm – I'm –

A. Well –

Q. – wanting to give you the opportunity to tell me what you understand so that we –

A. Well, I understand everybody sues everybody here.

Q. Okay. Do you understand that if the district gets away from the part of the Voting Rights Act that requires supervision by the federal government, that

it could still be sued if it violates someone's voting rights?

MR. HAYGOOD: I object to the form. It's a confusing question. But you can answer it if you [17] understand.

THE WITNESS: A person, even in order to sue, have to understand the system first. If you are a minority, most likely probably not to sue. Because there is discrimination, you probably don't – it's not easy to find a lawyer, you stand alone, you're probably an outcast in the neighborhood. That's what makes it very difficult to live in a white neighborhood if you as a minority try to sue. You better as well move out.

Q. (By Mr. Ward) But do you understand that the only part of the Voting Rights Act that the district is questioning in this lawsuit is the part that requires it to go to the federal government for approval for voting changes?

A. Yeah, but that is that safety switch that's off, then. The federal government can make that decision. That's what's the most important part to me.

Q. And – so is it fair to say that your interest in this lawsuit is a philosophical interest in keeping this safety switch?

A. Well, making it fair. The safety switch makes it fair for people like us.

Q. So you're not complaining, are you, about any specific problem with voting in the district?

A. No. But if the safeguard would let down, then [18] maybe I would complain, because things can change. And that's why I am here, I'm trying to avoid that.

MR. WARD: Okay. I think that's all I have. I'll pass the witness.

MR. HAYGOOD: Can we go off the record for a few minutes?

MR. WARD: Sure.

(Recess from 8:58 to 9:04 p.m.)

FURTHER EXAMINATION

BY MR. HAYGOOD:

Q. Ms. Graham, earlier in your deposition you mentioned that you see a lot of things but you don't say a lot of things. Can you elaborate on what you meant when you said that?

A. Well, it's – specific in Canyon Creek, I – I feel the way people look at me, if they don't know me, like misplaced. I talk to them, they wouldn't even know, but I can tell that they maybe try to figure out what I do for a living. You know, I am probably a pastor's wife or I do drugs or when I come with my – my children they think I was a teenage mom. But I wasn't, I got my kids actually really late.

I – I can tell – I can tell immediately when I look in the person's eye if – when I pass them they turn around, without even looking at them, I know [19] exactly who turns around and who doesn't turn around, because I just sense it. Maybe because I grew up in a white country, being black. I – maybe that's where I got the intuition for it. Not only – not that people looked at me in Germany because I am maybe not as much worse or maybe they more looked like more stunned that they see a black person. Not down on you, just more amazed. And maybe that's where I got that.

Does that make sense? They like – here it feels like I don't belong there because I am lower class. In Germany it felt like, whoa, where this black person come from?

Q. And are you speaking specifically about your experience in the MUD, in the district?

A. In – in the neighborhood. I mean, there are other neighborhoods, of course, where I don't feel that misplaced because there – there are more black people, so then it's not that obvious. But in Canyon Creek it's pretty obvious that people, they don't know me, they look at me like "Are you a visitor?" Even at the pool they – "Do you live in this neighborhood or are you just somebody visiting here and using the pool?" You know?

So – but I can tell as soon as the conversation start or – where this person is going. [20] And I'm always nice to them, so they wouldn't even realize

that I notice. And even the friends I have in – in Canyon Creek, we have a lot of friends we hang out with, too. They don't fit that stereotype people. They either looked at me right away equal and we became friends, but none of the people where I felt like awkward talking to them. But I sensed it. This is what I mean when I see a lot of things and – and I keep it in mind but not necessarily that the person will notice.

MR. HAYGOOD: That's all I have.

MR. HERREN: This is Chris Herren. I don't have any questions. Thank you.

THE WITNESS: Thank you.

MR. WARD: Then I think we're done.

(Deposition concluded at 9:07 p.m.)

[21] CHANGES AND CORRECTIONS

WITNESS NAME: YVONNE GRAHAM
DATE: _____

Reason Codes: (1) to clarify the record; (2) to conform to the facts; (3) to correct a transcription error; (4) other (please explain).

PAGE	LINE	CHANGE	REASON CODE

[22] _____
YVONNE GRAHAM

THE STATE OF _____)
)
COUNTY OF _____)

Before me, _____, on this day personally appeared YVONNE GRAHAM, known to me (or proved to me under oath or through

_____

(description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of May 2007.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF _____

[23] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff,	)	CIVIL ACTION NO. 1:06-CV-01384 (DST,PLF,EGS)
v.	)	
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

REPORTER'S CERTIFICATION
DEPOSITION OF YVONNE GRAHAM
Wednesday, April 25, 2007

I, RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, YVONNE GRAHAM, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on May 3, 2007 to the witness or to the attorney for the

witness for examination, signature and return to me by _____, 2007.

That the amount of time used by each party at the deposition is as follows:

[24] Mr. Gregory S. Coleman – 21 minutes
Mr. Ryan Paul Haygood – 9 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Christian Ward, attorney for Plaintiff

Mr. Carlos Becerra, attorney for MALDEF

Mr. Chris Herren and Ms. Christy A. McCormick, attorneys for U.S. Department of Justice

Mr. Benjamin Blustein, attorney for Lawyers' Committee for Civil Rights Under Law

Mr. Daniel A. Zibel, attorney for NAACP

Mr. Max Renea Hicks, attorney for Travis Cty.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 3rd day of May, 2007.

RANDALL N. FINCH, Texas CSR #504
Expiration date: 12/31/2008
Fredericks-Carroll Reporting
Firm Registration No. 82
7800 Shoal Creek Blvd., Suite 200-W
Austin, Texas 78757 (512) 477-9911

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701	)	
Plaintiff,	)	CIVIL ACTION NO.
v.	)	1:06-CV-01384 (DST, PLF, EGS)
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

* *

ORAL DEPOSITION OF
WENDY RICHARDSON
Thursday, April 26, 2007

* *

ORAL DEPOSITION OF WENDY RICHARDSON, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 26th day of April, 2007, from 9:00 a.m. to 9:35 a.m., before RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Yetter & Warden, LLP, 221 W. 6th Street, Suite 750, Austin, Texas 78701

pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

[2] APPEARANCES

FOR THE PLAINTIFF NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NO. ONE:

Mr. Christian Ward
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FOR THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION:

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FOR LDF:

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DEPOSITION EXHIBITS

(No exhibits were marked during this deposition)

[4] WENDY RICHARDSON,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. WARD:

Q. And I'm representing Northwest Austin Municipal Utility District No. 1.

A. Mm-hmm.

Q. Which, if I refer to the district or the MUD during this deposition, you understand that that's the district I'm referring to.

A. Correct.

Q. Okay. I know you've told the reporter your name. Will you please state your address for the record?

A. 11508 Tibee, that's T-i-b-e-e, Drive, Austin, Texas.

Q. And is that within the MUD?

A. Mm-hmm. Yes.

Q. And how long have you lived there?

A. One year and two months.

Q. And where did you live before you lived at –

A. California.

Q. And how long did you live in California?

A. Oh, all my life.

Q. Well, welcome to Austin.

[5] A. Thank you.

Q. And have you done anything to prepare for this deposition?

A. Uh-huh.

Q. What did you do to prepare for the deposition?

A. I read over the material, and our lovely Mr. Ryan here has sat down and we've asked – asked questions, answered questions and he's prepared us as well.

Q. And did you review any documents in preparation for this deposition?

A. Just the documents that were sent to me via e-mail.

Q. Okay. Did you bring any doc –

A. Via mail – I'm sorry.

Q. I'm sorry. Did you bring any documents –

A. No.

Q. – with you today?

A. No.

Q. Okay. Would you say that you are involved in your community?

A. I'm aware of my community. I haven't been there long enough to really get involved, but I'm involved enough to know what's going on within the community.

* * *

[10] homeowners association dues go to the MUD?

A. No. Our homeowners association dues goes to our homeowners.

Q. Okay.

A. It doesn't go to the MUD, not that I believe so. Does it? I don't know. I don't know where it goes. I just know we get an itinerary of the broken down of the 500 something thousand dollars and it's broken down into the landscape, the pools and everything else. So I have no clue where else that money goes.

Q. Okay. So – but is it – is it your understanding that the MUD board controls the spending of homeowners association dues?

A. No. I mean, I don't know. I have no clue.

Q. Okay.

A. Like I said, we get an itinerary of the breakdown of where our money goes to homeowners. They send one out every year. I know there's a total of 500 and something thousand dollars. We pay $400 a year for dues and it's broken down into landscaping, it's broken down into the park, it's broken down into the pool area. So I have no clue. I just know what's on that piece of paper. Whether if it's MUD related where MUD gets part of it, I don't know. It's relatively new to [11] me, especially to this city.

Q. Okay. I understand. Going back to the meeting of the MUD board that you attended, did you ask questions at the MUD board meeting?

A. I asked one question and that question was how come they felt like they weren't aware of what was going on when the – when that particular ballot came up, the board members were like a deer with headlights. They acted like they didn't know what was going on. It wasn't their responsibility to know what was going on.

We had residents there that asked questions to them and they didn't want to deal with the issue. They spent 10 minutes on it and it was thrown out.

They weren't going to vote on it. They said leave it for the end of the year.

Q. Okay. Let me back up a minute. When was this meeting that you attended?

A. This was last week on Thursday.

Q. Okay.

A. Seven o'clock. At Peace Lutheran Church.

Q. And did you feel like you got an answer to your question?

A. No. It was very uncomfortable. Me personally, I felt uncomfortable with even having a board that didn't want to address the MUD issue, nor – [12] I felt like they knew what was going on, they just didn't want to display anything because they felt like it wasn't important. That was my issue.

Q. Okay. Do you have – I know you have not had the opportunity to vote in a MUD board election yet, but do you know how those elections are run?

A. No. The only thing I can think of is my grandparents where they were run in churches and schools. That was it.

Q. Okay. But you don't have – is it correct to say that you don't have any specific information about elections run by this particular MUD?

A. No. Not this particular . . .

Q. We talked a little bit about the homeowners association in Canyon Creek. Do you get the Canyon Creek homeowners association newsletter?

A. Mm-hmm.

Q. And do you read that newsletter?

A. I read it all the time.

Q. And we talked about the MUD board, and am I correct – am I understanding you correctly that you have some familiarity with Don Zimmerman?

A. I know Zimmerman is posted everywhere. I know it's a family tradition here. He's got a street named after him. Elections came up; I guess he got voted in [13] again. So I am aware of – he has a history here, a family history in Austin. I mean, when you name a street after you, so you have to be some – of importance.

Q. Do you know any other members of the MUD board?

A. No. Not by name. Now, if there were faces here I could tell you who was there. But name-wise, no.

Q. Okay.

A. They don't send a list of names around at the meeting.

Q. Let me – related to that, though, let me ask you if you're familiar with the names of some

individuals who are either on the MUD board now or have been recently. I'm just going to ask you – these may be people you're familiar with but maybe you didn't realize they were on the MUD. So can I just ask you –

A. Mm-hmm.

Q. – are you familiar with Bill Ferguson?

A. Uh-uh.

Q. How about George Frederickson?

A. Uh-uh.

MR. HAYGOOD: You need to say yes or no.

THE WITNESS: No. Sorry.

* * *

[18] Q. – polling place?

A. Uh-uh.

Q. Okay. I just – I just want – I just want to clarify to make sure –

A. No.

Q. – you understood that question. I –

A. Okay.

Q. – I am – do you feel that the MUD should have to go through this preclearance –

A. Yes, they should.

Q. – process?

A. They should.

Q. So you believe that the MUD should not be permitted to get the bailout that would exempt it from going through that process.

A. Correct. Yes.

Q. And since you have – you have mentioned that you have no specific information about elections with this particular MUD, would it be fair to say that your primary interest in this lawsuit is a philosophical objection to the MUD getting the bailout?

A. Correct. Yes.

Q. And do you believe that no political entity –

A. Mm-hmm.

Q. – should ever be able to get a bailout?

[19] A. No. I'm not saying that. It just depends on to me – me personally, it depends on your state. It depends on what city. Just depends. We're talking about this issue now. I can't say for anyone else, I'm just saying for our district right now. That's what we have to be concerned about. I mean, fair is fair.

Q. So are you aware that some parts of the country are covered by the preclearance –

A. Some are.

Q. – requirement –

A. Some are not. And if you noticed, the ones that are are more south, because of history. That's why I don't feel like they – they are going to have to – they need to go through preclearing. It's due to history. I mean, history holds a lot when it comes down to the south.

Q. Are you aware that the bailout process requires a jurisdiction to show a recent history of complying with the Voting Rights Act?

A. Don't know. No.

Q. If – if I were to tell you that to get the bailout, a jurisdiction has to go to a court and show compliance, show a history of compliance, would that affect your opinion of bailout?

A. No.

[20] Q. So do you think that once an area is covered, that there should ever be a possibility for that area to show –

A. I can't answer that. That's – that's not for me to judge. I don't know. I can't answer that. Cities change, states can change, but the ones that are here, some of them won't – will never change. So when it comes down to the City of Austin and where I live, that's the only one I'm concerned about. I'm not concerned about any other city or state. I'm concerned about the one I live in right now.

Q. And if a – if a city or a state, though, does change and shows that it changed, would that affect your idea about whether bailout should be available?

A. No. I don't live in that state. Like I said, the only thing I'm concerned about is this one right now. If I was in another state, then I would be concerned about that, but for right now, we're not talking about other states, we're talking about the State of Texas, the City of Austin, and 11508 Tibee, Canyon Creek area, which sits in that MUD district in my area. That's what I'm worried about right now. Because I live there. I have children and there are a lot of other children there. I want to make sure that whatever happens or the outcome of this, it's done [21] fair.

We're in the 21st, 22nd century and I feel like that we have the right to make sure everything is fair. Discrimination can be against anything. But my thing is I want to make sure that the MUD district is being fair to the residents that are there in Canyon Creek. That's what I'm concerned about right now.

Q. And you feel that the best way to do that is for it to go through the federal government for pre-clearance?

A. And it needs to go through the federal government. Not only the federal government, it needs to go higher. Whatever resolution to resolve this, it can go as high as the Supreme Court.

Q. Other than elections, are there other areas relating to local governments that you think should go through the federal government?

A. Not that I am aware of. I'm from California. I don't have to deal with this. We don't go through MUD problems, discrimination. We go vote and we're finished. This is – coming to the south, it's just – it's got its own aura, it's just different. There's always going to be litigations within the south. Coming from California, we vote. We don't have a

* * *

[30] CHANGES AND CORRECTIONS

WITNESS NAME: WENDY RICHARDSON
DATE: _____

Reason Codes: (1) to clarify the record; (2) to conform to the facts; (3) to correct a transcription error; (4) other (please explain).

PAGE	LINE	CHANGE	REASON CODE

[31] _____
WENDY RICHARDSON

THE STATE OF _____)
)
COUNTY OF _____)

Before me, _____, on this day personally appeared WENDY RICHARDSON, known to me (or proved to me under oath or through

_____

(description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of May 2007.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF _____

[32] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff,	)	CIVIL ACTION NO. 1:06-CV-01384 (DST,PLF,EGS)
v.	)	
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

REPORTER'S CERTIFICATION
DEPOSITION OF WENDY RICHARDSON
Thursday, April 26, 2007

I, RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, WENDY RICHARDSON, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on May 3, 2007 to the witness or to the attorney for the

witness for examination, signature and return to me by _____, 2007.

That the amount of time used by each party at the deposition is as follows:

[33] Mr. Christian Ward – 27 minutes

Mr. Ryan Paul Haygood – 10 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Christian Ward, attorney for Plaintiff

Mr. Carlos Becerra, attorney for MALDEF

Mr. Chris Herren and Ms. Christy A. McCormick, attorneys for U.S. Department of Justice

Mr. Benjamin Blustein, attorney for Lawyers' Committee for Civil Rights Under Law

Mr. Daniel A. Zibel, attorney for NAACP

Mr. Max Renea Hicks, attorney for Travis Cty.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 3rd day of May, 2007.

RANDALL N. FINCH, Texas CSR #504
Expiration date: 12/31/2008
Fredericks-Carroll Reporting
Firm Registration No. 82
7800 Shoal Creek Blvd., Suite 200-W
Austin, Texas 78757 (512) 477-9911

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff,	)	CIVIL ACTION NO. 1:06-CV-01384 (DST,PLF,EGS)
v.	)	
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

* *

ORAL DEPOSITION OF
MARISA WILLIAMS
Thursday, April 26, 2007

* *

ORAL DEPOSITION OF MARISA WILLIAMS, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 26th day of April, 2007, from 10:00 a.m. to 10:16 a.m., before RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Yetter & Warden, LLP, 221 W. 6th Street, Suite 750, Austin, Texas 78701 pursuant to

the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

[2] APPEARANCES

FOR THE PLAINTIFF NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NO. ONE:

Mr. Christian Ward
YETTER & WARDEN, LLP
221 West Sixth Street, Suite 750
Austin, Texas 78701 (512) 743-2642

FOR THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION:

Mr. Richard Dalheim (By telephone)
Attorney at Law
950 Pennsylvania Avenue, N.W., Room 7246
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(202) 327-3961 Fax

FOR LDF:

Mr. Ryan Paul Haygood
Assistant Counsel
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New York, New York 10013 (212) 965-2235
(212) 226-7592 Fax

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DEPOSITION EXHIBITS

(No exhibits were marked during this deposition)

[4] MARISA WILLIAMS,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. WARD:

Q. Ms. Williams, one thing just to clarify for the record, I think we had your last name down as Richardson?

A. Richardson. That's what my mother said.

Q. Well, I think that's – that's what we have on the paper. But just to clarify, you are Marisa Williams?

A. Yes.

Q. And – and I am Chris Ward. I represent Northwest Austin Municipal Utility District No. 1, which is the plaintiff in this lawsuit. And just – will you understand me if I say that – if I refer to the

MUD or the district during this deposition, that that's the district I'm going to be referring to?

A. Right.

Q. And just a reminder, for the court reporter, to give yes-or-no answers since he can't record head nods or uh-uhs. Is that –

A. No problem.

Q. Good. Will you please tell me your address for the record.

[5] A. 11508 Tibee Drive.

Q. And is that within the MUD?

A. I don't know.

Q. And how long have you lived there?

A. Eight months.

Q. And where did you live before that?

A. In California.

Q. And how long did you live in California?

A. My whole life.

Q. Where in California did you live?

A. Bay Area.

Q. And have you done anything to prepare for this deposition today?

A. Yes.

Q. And what did you do to prepare for this deposition?

A. I spoke with my attorney.

Q. And did you review any documents?

A. No.

Q. Did you bring any documents with you?

A. No.

Q. Would you say that you are involved in your community?

A. No.

Q. Do you vote?

[6] A. No.

Q. And have you ever voted?

A. No.

Q. Do you know what elections the MUD holds?

A. No.

Q. Are you aware that the MUD is governed by a board of directors?

A. No.

Q. Have you ever attended any board meetings of the MUD?

A. No.

Q. Have you ever attended a meeting of the homeowners association in the Canyon Creek neighborhood?

A. No. Not old enough.

Q. Okay. Does your household get the Canyon Creek homeowners association newsletter?

A. Yes.

Q. And do you read that?

A. Yes.

Q. Can you tell me how you came to be involved as an intervenor in this lawsuit?

A. My neighbors had spoke with us about it, and it sounded really interesting so I decided to get involved.

[7] MR. WARD: And, I'm sorry, Richard, are you – are you hearing her answers over the phone?

MR. DALHEIM: Yes, I am.

MR. WARD: Okay.

MR. DALHEIM: Yeah.

Q. (By Mr. Ward) Now, in answering this next question, I don't want you to go into the content of any discussions that you might have had with your attorneys or any communications, e-mails, whatever you might have had with attorneys, but without going

into that, what is your understanding of what this lawsuit is about?

A. I don't know.

Q. Do you know what Section 5 of the Voting Rights Act is?

A. Yes.

Q. And what is your understanding of what Section 5 of the Voting Rights Act is?

A. My understanding is you are not allowed to move a poll unless it's – you're notified by – the federal government is notified or gives you permission.

Q. Okay. And are you aware that that process of the MUD going to the federal government per – for permission is known as preclearance?

A. No.

[8] Q. Are you familiar with the term bailout?

A. No.

Q. Do you understand that the MUD is asking not to have to go through that preclearance process with the federal government?

A. Yes.

Q. And if – if I use the term bailout, that's going to refer to that – getting out of that.

A. Okay.

Q. Are you aware – or – let me start over. Is it your understanding that all local governments in the United States have to go through this preclearance process with the federal government?

A. No.

Q. So is it your understanding that only some areas have to do that?

A. Yes.

Q. Do you know whether more parts of the country have to go through preclearance or whether more parts of the country do not have to go through that?

A. I don't know.

Q. I think you said that you're – you're not really familiar with the MUD board's elections. Is it then fair to say that you don't have specific information about any elections held by the MUD?

[9] A. Well, the main thing is I'm not – I just turned 18, so I'm not old enough to vote. I really wasn't – since I am fairly new down here, I do not – this is my first time getting to know about MUD, so . . .

Q. So you don't have any specific information about any elections that the MUD has held.

A. Right.

Q. So is it fair to say that your main interest in this lawsuit is a philosophical objection to the MUD getting bailed out from the preclearance process?

A. Right.

Q. Do you believe that any local government like the MUD should ever be allowed to bail out from the preclearance process?

A. No.

Q. Do you think that all local governments in the United States should be required to go through the preclearance process?

A. Yes.

MR. WARD: I think that's all I have. And I will pass this witness.

MR. HAYGOOD: We'll just go off the record for a few minutes.

(Recess from 10:11 to 10:15 a.m.)

FURTHER EXAMINATION

[10] BY MR. HAYGOOD:

Q. Ms. Williams, you are the daughter of Wendy Richardson, who is also an intervenor in this case. Is that correct?

A. Yes.

Q. And you reside at 11508 Tibee Drive?

A. Yes.

Q. That's correct? Is that within the MUD?

A. Yes.

Q. And you mentioned earlier in your testimony that one of your neighbors first told you about this case and that's how you learned about it and that it sounded interesting to you.

A. Yes.

Q. What sounded interesting to you about this particular challenge?

A. I found it interesting that – that there was still discrimination in some form of companies.

Q. And you wanted to be a part of this case?

A. Yes.

Q. For that reason?

A. Right.

MR. HAYGOOD: That's all I have.

MR. WARD: Richard, do you have any questions?

[11] MR. DALHEIM: No, I have no questions. Thank you.

MR. WARD: Okay. I have one follow-up question on redirect.

FURTHER EXAMINATION

BY MR. WARD:

Q. Just to clarify, Ms. Williams, when I asked you earlier if your address is within the MUD, you said you didn't know. Just now your attorney asked you the same question and you said yes. Do you – is that something you know of your own personal knowledge or –

A. No.

Q. Okay.

MR. WARD: Thank you very much. And that's all I have and we can go off the record.

(Deposition concluded at 10:16 a.m.)

[12] CHANGES AND CORRECTIONS

WITNESS NAME: MARISA WILLIAMS

DATE: _____

Reason Codes: (1) to clarify the record; (2) to conform to the facts; (3) to correct a transcription error; (4) other (please explain).

PAGE	LINE	CHANGE	REASON CODE

[13] _____

MARISA WILLIAMS

THE STATE OF _____)
)
COUNTY OF _____)

Before me, _____, on this day personally appeared MARISA WILLIAMS, known to me (or proved to me under oath or through

_____

(description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of May 2007.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF _____

[14] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff,	)	CIVIL ACTION NO. 1:06-CV-01384 (DST,PLF,EGS)
v.	)	
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

REPORTER'S CERTIFICATION
DEPOSITION OF MARISA WILLIAMS
Thursday, April 26, 2007

I, RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, MARISA WILLIAMS, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on May 3, 2007 to the witness or to the attorney for the

witness for examination, signature and return to me by _____, 2007.

That the amount of time used by each party at the deposition is as follows:

[15] Mr. Christian Ward – 8 minutes

Mr. Ryan Paul Haygood – 2 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Gregory S. Coleman, attorney for Plaintiff

Mr. Carlos Becerra, attorney for MALDEF

Mr. Chris Herren and Ms. Christy A. McCormick, attorneys for U.S. Department of Justice

Mr. Benjamin Blustein, attorney for Lawyers' Committee for Civil Rights Under Law

Mr. Daniel A. Zibel, attorney for NAACP

Mr. Max Renea Hicks, attorney for Travis Cty.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 17th day of April, 2007.

RANDALL N. FINCH, Texas CSR #504
Expiration date: 12/31/2008
Fredericks-Carroll Reporting
Firm Registration No. 82
7800 Shoal Creek Blvd., Suite 200-W
Austin, Texas 78757 (512) 477-9911

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff,	)	CIVIL ACTION NO. 1:06-CV-01384 (DST, PLF, EGS)
v.	)	
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

* *

ORAL DEPOSITION OF
JAMAL RICHARDSON
Thursday, April 26, 2007

* *

ORAL DEPOSITION OF JAMAL RICHARDSON, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 26th day of April, 2007, from 7:02 p.m. to 7:28 p.m., before RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Yetter & Warden, LLP, 221 W. 6th Street, Suite 750, Austin, Texas 78701 pursuant to the Federal Rules of Civil Procedure and

the provisions stated on the record or attached hereto.

[2] APPEARANCES

FOR THE PLAINTIFF NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NO. ONE:

Mr. Christian Ward
YETTER & WARDEN, LLP
221 West Sixth Street, Suite 750
Austin, Texas 78701 (512) 743-2642

FOR THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION:

Mr. Richard Dalheim (By telephone)
Attorney at Law
950 Pennsylvania Avenue, N.W., Room 7246
Washington, D.C. 20530 (202) 305-0609
(202) 327-3961 Fax

FOR LDF:

Mr. Ryan Paul Haygood
Assistant Counsel
99 Hudson Street, Suite 1600
New York, New York 10013 (212) 965-2235
(212) 226-7592 Fax

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DEPOSITION EXHIBITS

(No exhibits were marked during this deposition)

[4] JAMAL RICHARDSON,
having been first duly sworn, testified as follows:

EXAMINATION

BY MR. WARD:

Q. Mr. Richardson, I'm Chris Ward and I am here representing Northwest Austin Municipal Utility District No. 1. If I during the deposition refer to the MUD or the district, you will understand that I am referring to that district?

A. Yes.

Q. Okay. And that district is the plaintiff in this lawsuit. You have given the court reporter your full name for the record. Will you please state for the record your address?

A. My address is 11508 Tibee, T as in Tom, i-b as in boy, e-e, Drive, Austin, Texas 78726.

Q. And is that address inside the district?

A. Yes, it is.

Q. And how long have you lived there?

A. I've lived there since last February 12th. So about a year so far now. A little bit over a year.

Q. And where did you live before that?

A. I lived in Hayward, California.

Q. And how long did you live there?

A. I lived in California for pretty much most of [5] my life. So 35 years.

Q. And have you done anything to prepare for this deposition?

A. No.

Q. Did you review any documents?

A. I already had information on Section 5. I – my family comes from a long line of pollers. My father – my stepfather is an administrator in California, or at least he used to be. So I have some information but not pertaining to Texas itself.

Q. Okay. So you already had some familiarity –

A. Yes.

Q. – with the general subject?

A. Yes.

Q. And did you bring any documents with you today?

A. No. No, I did not.

Q. Would you say that you are involved in your community?

A. Yes, I am.

Q. All right. Can you tell me about some of your community involvement.

A. Right now I – I like the beautification of my neighborhood. Basically, I walk around cleaning up the area, talk to my neighbors, make sure that everything

* * *

[10] about?

A. The lawsuit is about the federal decision for polling booths, the right to notify the community about deciding to move that polling booth from one section to the – to another section. And that right now, as far as I understand it, that has not been happening. There's not been enough information back and forth. And also the fact that the – those polling booths decide – well, MUD is the one that wants to move – not move the polling booths, but they want to go ahead and change the federal ruling behind it about their ability to move those polling booths.

Q. Okay. In the context of the Voting Rights Act, are you familiar with Section 5?

A. I know a little bit about it.

Q. Okay. Do you understand Section 5 as the part of the Voting Rights Act that requires the MUD to seek federal approval for changes made to voting?

A. Yes.

Q. Are you familiar with the term preclearance in the context of the Voting Rights Act?

A. I would – just taking the word itself, means prior clearance before actually doing anything.

Q. So are – were you – are you aware that the Section 5 process of going to the federal government is [11] known as preclearance in this context?

A. Well, now I do. So –

Q. Okay. So just in case I use the word preclearance from now on –

A. I will understand what it means, yes.

Q. – that – that's what I'll be talking about. And are you familiar with the term bailout?

A. If I understand the term correctly, it means ability to go ahead and get out of whatever procedures that you're go ahead – are mandated to follow.

Q. So do you understand that the MUD is seeking a bailout in this lawsuit from the preclearance process?

A. Yes.

Q. And you've said that you don't have specific information about particular elections in the MUD, so is it fair to say that you're not complaining about specific problems with elections that you know about in' the MUD?

A. Since I've only been down here for a year, I don't know – I can't speak for anything that has happened in the past. I can only speak of anything that's going from now into the future. So in my opinion it – it should be the same way it has been without any changes.

Q. But with regard to what you know about since [12] you've been here, is it fair to say that you don't have a specific complaint about any specific election?

A. No. That's – well, yes, that is correct.

Q. Yes, that's correct. Okay. So, then, is it also fair to say that your main interest in this lawsuit is a philosophical objection to the MUD getting a bailout from the preclearance process in the future?

A. Yes.

Q. Do you believe that any political entity, any jurisdiction should ever be allowed to get a bailout from the preclearance process?

A. At the – in our society today, no, they shouldn't get a bailout. When you bail out, you're basically are – are trying to circumvent something that has been put there for a reason. If that reason

has not changed, then you shouldn't bail out of it. You should follow the reason – the original mandate that was set in stone, basically.

Q. Would it make a difference to you if a political – a political unit could show that things had changed?

A. I would be interested in seeing that, but I don't believe that that's even possible in today's society, that it actually has changed.

Q. And do you think that applies to the whole [13] country or just parts of the country? Let – let me clarify that. What you have said about today's society, do you feel that that applies to the entire country or to certain areas of the country?

A. It's – it applies to the entire country, but it's – in certain areas it's even worse. So it pertains to those areas even more so. Some areas are not as progressive, not as – as – hasn't made social changes in order to go ahead and go further.

Q. Are you aware that the Section 5 preclearance process applies only to certain areas of the country and not to other parts of the country?

A. Yes.

Q. Do you think that the decision whether a particular part of the country should be covered by Section 5 preclearance should be based on certain factors about that particular part of the country?

A. They do weigh more heavily in certain sections, yes.

Q. So do you think that someone should maybe examine areas of the country before they're covered to decide if they should be covered?

A. Yes. They should examine all the time, period. But they also have to come with an open mind, that just because you're looking at that one section

* * *

[18] CHANGES AND CORRECTIONS

WITNESS NAME: JAMAL RICHARDSON DATE: _____

Reason Codes: (1) to clarify the record; (2) to conform to the facts; (3) to correct a transcription error; (4) other (please explain).

PAGE	LINE	CHANGE	REASON CODE

[19] _____
JAMAL RICHARDSON

THE STATE OF _____)
)
COUNTY OF _____)

Before me, _____, on this day personally appeared JAMAL RICHARDSON, known to me (or proved to me under oath or through

_____

(description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of May 2007.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF _____

[20] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 Plaintiff,	)	CIVIL ACTION NO. 1:06-CV-01384 (DST,PLF,EGS)
v.	)	
ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530	)	

REPORTER'S CERTIFICATION
DEPOSITION OF JAMAL RICHARDSON
Thursday, April 26, 2007

I, RANDALL N. FINCH, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, JAMAL RICHARDSON, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness.

That the deposition transcript was submitted on May 3, 2007 to the witness or to the attorney for the

witness for examination, signature and return to me by _____, 2007.

That the amount of time used by each party at the deposition is as follows:

[21] Mr. Christian Ward – 24 minutes
Mr. Ryan Paul Haygood – 0 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Christian Ward, attorney for Plaintiff

Mr. Carlos Becerra, attorney for MALDEF

Mr. Chris Herren and Ms. Christy A. McCormick, attorneys for U.S. Department of Justice

Mr. Benjamin Blustein, attorneys for Lawyers' Committee for Civil Rights Under Law

Mr. Daniel A. Zibel, attorney for NAACP

Mr. Max Renea Hicks, attorney for Travis Cty.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 3rd day of May, 2007.

RANDALL N. FINCH, Texas CSR #504
Expiration date: 12/31/2008
Fredericks-Carroll Reporting
Firm Registration No. 82
7800 Shoal Creek Blvd., Suite 200-W
Austin, Texas 78757 (512) 477-9911

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, 401 W. 15th Street Suite 850 Austin, Texas 78701 *Plaintiff*,	§	
v.	§	Civil Action No. 1:06-CV-01384 (DST, PLF, EGS)
ALBERTO GONZALES, Attorney General of the United States, U.S. Department of Justice 950 Pennsylvania Avenue NW Washington, D.C. 20530, *Defendant.*	§	

AFFIDAVIT OF FRANK REILLY

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

I, FRANK REILLY, after first being duly sworn, deposes and states under the pains and penalties of perjury as follows:

1. That I am an individual over twenty-one years of age, of sound mind, who has never been convicted of a felony, is capable of making this affidavit, and is fully competent to testify to the matters stated herein.

2. I am an attorney admitted to practice before all courts of the State of Texas. I am a partner at the law firm of Potts & Reilly, L.L.P. and maintain an office in Austin, Texas.

3. Since 2002 I have been counsel to Northwest Austin Municipal Utility District Number One.

4. I am personally acquainted with the facts herein stated by reason of performance of my service as counsel to the district and based on the district's business records, of which I am the custodian.

5. The district has never used any type of test or device as a prerequisite for voting or registration for voting.

6. The district has never used a literacy test as a prerequisite for voting or registration for voting.

7. The district has never used an education or knowledge requirement as a prerequisite for voting or registration for voting.

8. The district has never used a good-moral-character requirement as a prerequisite for voting or registration for voting.

9. The district has never used a voucher requirement as a prerequisite for voting or registration for voting.

10. The district has never conducted English-only elections. The district has always provided election materials in Spanish, as well as English.

11. No final judgment of any court of the United States has determined that denials or abridgements of the rights to vote on account of race or

color have occurred anywhere in the district's territory.

12. No final judgment of any court of the United States has determined denials or abridgements of the right to vote in contravention of the guarantees of 42 U.S.C. §1973(f)(2) have occurred anywhere in the district.

13. The district has not entered into any consent decree, settlement agreement, or other agreement that resulted in any abandonment of a voting practice challenged on grounds that it denied or abridged the rights to vote on account of race or color or in contravention of the guarantees of 42 U.S.C. §1973(f)(2).

14. No action that was commenced before the filing of this case is pending against the district alleging any denials or abridgements of the right to vote.

15. No declaratory judgment has been denied under section 5 of the Voting Rights Act with respect to any preclearance submission made by the district. Nor are any such declaratory-judgment actions pending.

16. No objections have been interposed with respect to any preclearance submission made by the district.

17. No lawsuit has even been filed against the district alleging that it denied or abridged the right to vote on account of race or color or in contravention of the guarantees of 42 U.S.C. §1973(f)(2).

18. The United States Government has never assigned an examiner to the district, pursuant to the Voting Rights Act.

19. There are no other governmental units are [sic] within the district's territory.

20. The district has never used any voting procedures or methods of election that inhibited or diluted equal access to the electoral process.

21. There have been no reports, indications, or evidence of any intimidation or harassment of persons exercising rights protected under the Voting Rights Act with respect to the district's electoral process.

FURTHER AFFIANT SAYETH NOT.

Dated this 15th day of May, 2007

[SEAL]
DEBBIE RATHCKE
NOTARY PUBLIC
STATE OF TEXAS
My Comm. Expires 11-14-2008

/s/ Frank Reilly
Frank Reilly

SUBSCRIBED and SWORN to before me on this 15th day of May, 2007

/s/ Debbie Rathcke
Notary Public, State of Texas

My commission expires: 11-14-08

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, Plaintiff,	)	
v.	)	Civil Action No. 1:06-cv-1384 (PLF, DST, EGS)
ALBERTO GONZALES, Attorney General of the United States *et al.*	)	
Defendant.	)	

DEFENDANT'S STATEMENT OF UNCONTESTED MATERIAL FACTS

(Filed May 15, 2007)

Pursuant to Local Civil Rule 56.1, Defendant Attorney General of the United States submits the following statement of material facts as to which the United States contends there is no genuine issue.

The Plaintiff is Subject to Section 5

1. The Plaintiff Northwest Austin Municipal Utility District Number One ("The Plaintiff") is a municipal utility district, which is a governmental entity organized under the constitution and laws of the State of Texas. *See* Amended Complaint at ¶ 2; Tex. Const. Art. XVI, § 59; Tex. Water Code § 54.011; Reilly Dep. at 17:14 to 17:25.

2. Municipal utility districts such as the Plaintiff operate under Chapters 49 and 54 of the Texas Water Code, and Title 30, Texas Admin. Code, Chapter 293. *See* Collins Dep. at 53:19-25 to 54:1-14.

3. Municipal utility districts such as the Plaintiff have significant governmental powers under Texas law, including powers to build and operate public works, issue bonds, and levy and collect taxes. *See* Tex. Water Code §§ 54.012, 54.201, 54.203, 54.501, 54.601, 49.066.

4. The Plaintiff conducts elections for its district directors under the Texas Election Code. *See* Amended Complaint at ¶ 6, Answer to Amended Complaint at ¶ 6; Tex. Water Code § 49.101.

5. The State of Texas became covered as a whole by the temporary provisions of the Voting Rights Act, based on a coverage determination made by the Attorney General and the Director of the Census dated September 18, 1975, and published in the Federal Register on September 23, 1975. *See* 40 Fed. Reg. 43746.

6. The State of Texas and all of its political subunits, such as the Plaintiff, must receive preclearance under Section 5 of the Voting Rights Act for all changes affecting voting enacted or implemented after November 1, 1972. *See* Amended Complaint at ¶ 10, Answer to Amended Complaint at ¶ 10; 28 C.F.R. Part 51, Appendix.

7. The Plaintiff is located entirely within the boundaries of Travis County, Texas. *See*

Amended Complaint at ¶ 6; Answer to Amended Complaint at ¶ 6; Reilly Dep. at 91:3 to 91:7.

8. The Plaintiff is located entirely within the boundaries of the City of Austin, Texas. *See* Reilly Dep. at 91:3 to 91:7.

The Plaintiff's Creation and Election History

9. On April 18, 1986, based on a petition from a developer, the Texas Water Commission initially created the Plaintiff district, to encompass 671.65 acres. The Texas Water Commission appointed the first set of five temporary directors for the Plaintiff. *See* Herren Declaration, Government Exhibit 1; Tex. Water Code §§ 54.014, 54.021, 54.022.

10. The original five directors appointed for start-up districts such as the Plaintiff tend to be suggested by and acquainted with the developer, and the developer not infrequently conveys an interest in land to a prospective director in order to qualify them to serve as a director. *See* Collins Dep. at 39:25 to 41:03, 48:04 to 49:13; 136:02 to 138:10; Zimmerman Dep. at 51:20 to 52:01.

11. On June 27, 1986, the City of Austin initiated litigation challenging the Texas Water Commission's creation of the Plaintiff district. *See* Herren Declaration, Government Exhibit 25; Tex. Water Code § 54.023.

12. On December 13, 1986, Plaintiff held an election to (1) confirm the creation of the district, (2) elect directors, and (3) vote on bond and maintenance

tax issues. A total of two ballots were cast in this election, with two votes cast for each of five directors, who were running at large without opposition. Two votes were also cast in favor of creation of the Plaintiff, in favor of the bond issue, and in favor of the maintenance tax. *See* Collins Dep. at 166:03-166:13 & Ex. 35; Herren Declaration, Government Exhibit 9; Tex. Water § Code 49.102.

13. The litigation with the City of Austin was resolved in a written agreement dated December 9, 1987, in which the City consented to the creation of the Plaintiff. *See* Collins Dep. at 39:01 to 39:24. That agreement defines the specific division of responsibilities between the City and the Plaintiff and has been amended several times. *See* Herren Declaration, Government Exhibit 26.

14. On January 7, 1988, pursuant to that agreement, the land encompassing the Plaintiff was annexed by the City of Austin into its municipal boundaries. *See* Zimmerman Dep., at 112:22 to 113:14; Herren Declaration, Government Exhibit 27.

15. On March 8, 1988, counsel for the Plaintiff transmitted to the Texas Water Commission the resignations of the original set of directors for the Plaintiff, who had been elected in the December 13, 1986 election. The first set of directors for the Plaintiff were affiliated with the original developer of the district, who had declared bankruptcy in the interim. *See* Collins Dep. at 166:19 to 167:18, Ex. 36.

16. On March 16, 1988, at the request of the developer, the Texas Water Commission created anew the Plaintiff district, which now encompassed 707.19 acres. The Texas Water Commission appointed a different set of five temporary directors, who were affiliated with the new developer for the Plaintiff. *See* Collins Dep. at 167:14 to 167:18, Herren Declaration, Government Exhibit 2.

17. On May 7, 1988, the Plaintiff held a confirmation, director, bond and maintenance tax election. There was one ballot cast in this election in favor of confirming the district, in favor of the bond issue, and in favor of the maintenance tax. The ballot also cast one vote for each of five directors, who ran at-large and unopposed. *See* Herren Declaration, Government Exhibit 10; Zimmerman Dep. at 27:05 to 27:14; Tex. Water Code § 49.102.

18. On May 5, 1990, the Plaintiff held a director election. There were four votes cast in this election for each of five directors, who ran at-large and unopposed. *See* Herren Declaration, Government Exhibit 11.

19. The Plaintiff thereafter established staggered terms for its five directors, with two directors elected in the 1992 election and every four years thereafter, and three directors elected at the 1994 election, and every four years thereafter. *See* Herren Declaration, Government Exhibit 11; Reilly Dep. at 89:21 to 90:07.

20. On May 2, 1992, the Plaintiff held a director election. There were two votes cast for each of two

directors running unopposed for two numbered places. *See* Herren Declaration, Government Exhibit 12.

21. On May 7, 1994, the Plaintiff held a director election. There were two votes cast for each of three directors running unopposed for three numbered places. *See* Herren Declaration, Government Exhibit 14.

22. In the 1992 and 1994 elections, the Plaintiff implemented numbered posts in its director elections, and did not seek preclearance for that voting change. The Plaintiff apparently did not utilize numbered posts in its elections after 1994. *See* Herren Declaration, Government Exhibit 13, 15.

23. The Plaintiff cancelled its May 4, 1996 directors' election pursuant to a new state law allowing for such cancellations when all candidates are unopposed, as the two candidates were in this election. *See* Herren Declaration, Government Exhibit 16, Tex. Elec. Code § 2.051 to 2.054 (enacted in 1995).

24. The Plaintiff cancelled its May 2, 1998 directors' election pursuant to state law because the three candidates were unopposed. *See* Herren Declaration, Government Exhibit 17.

25. The Plaintiff cancelled its May 6, 2000 directors' election pursuant to state law because the two candidates were unopposed. *See* Herren Declaration, Government Exhibit 18.

26. On May 4, 2002, the Plaintiff held a director election. There were a total of 253 ballots cast,

with 824 total votes spread among six candidates, running at large for three positions. *See* Herren Declaration, Government Exhibit 19, 20.

27. The 2002 election was the first in the history of the Plaintiff that was contested, involving more candidates running for election than there were open positions. *See* Collins Dep. at 41:11 to 41:15, 139:19 to 139:23; Zimmerman Dep. at 51:03 to 51:10.

28. On May 7, 2004, the Plaintiff entered into a joint election agreement for Travis County to conduct its May 15, 2004 election. *See* DeBeauvoir Dep. Ex 6.

29. The Travis County clerk has contracted to conduct the elections for virtually all the subjurisdictions in the county, numbering at least 107 jurisdictions. The Plaintiff was one of the last governmental units that conduct elections in Travis County to enter into a joint election agreement, as a standard contract for the County to conduct the Plaintiff's elections. Such agreements allow entities holding elections on the same dates to use common polling places, common early voting procedures, common ballots, common poll officials, etc. *See* DeBeauvoir Dep. at 6:16 to 8:10, 13:13 to 13:20, 44:15 to 44:18, 71:22 to 72:06; Zimmerman Dep. at 57:23 to 58:05; 62:16 to 62:22; Tex. Elec. Code §§ 271.001-271.014.

30. The May 15, 2004 election was the first election held under the joint election agreement with Travis County, and was conducted in Travis County's Election Precinct 333 at the Canyon

Creek Elementary School, located within the boundaries of the Plaintiff. *See* DeBeauvoir Dep., Ex. 6; Herren Declaration, Government Exhibit 8.

31. In Plaintiff's May 15, 2004, director election, there were a total of 439 ballots cast, with 695 total votes distributed among three candidates running at large for two director positions. As of the May 15, 2004 election, there were a total of 2,276 registered voters in the Plaintiff. *See* Herren Declaration, Government Exhibit 21.

32. On or about March 28, 2006, the Plaintiff entered into an election services agreement with Travis County for the county to conduct the Plaintiff's elections until at least 2011, with the agreement renewable automatically for two additional three year terms, until 2017. *See* DeBeauvoir Dep. Ex. 10; Reilly Dep. at 44:22 to 45:19.

33. On April 18, 2006, the Plaintiff entered into a joint election agreement for Travis County to conduct its May 13, 2006 election. *See* DeBeauvoir Dep. Ex. 5.

34. The May 13, 2006 election was the second election held under a joint election agreement with Travis County. The Plaintiff's election was conducted in Travis County's Election Precincts 333 and 343 at the Canyon Creek Elementary School, located within the boundaries of the Plaintiff. *See* DeBeauvoir Dep. Ex. 5; Herren Declaration, Government Exhibit 31.

35. The Attorney General's records do not reflect any evidence that either of the two 2006 election agreements between Travis County and the Plaintiff was submitted for review under Section 5 of the Voting Rights Act by either Travis County or the Plaintiff. *See* Herren Declaration at ¶ 55.

36. In Plaintiff's May 13, 2006 director election, there were a total of 495 ballots cast, with 883 votes distributed among five candidates running at large for three director positions. As of the May 13, 2006 election, there were a total of 3,129 registered voters in the Plaintiff. *See* Herren Declaration, Government Exhibit 22.

37. As of May 10, 2007, Travis County reports that the Plaintiff includes 3,175 total registered voters, including 2,548 registered voters in Precinct 333, and 627 registered voters in Precinct 343. *See* Herren Declaration, Ex. 24.

38. From 1988 until 2002, the Plaintiff held elections at locations separate from other elections held on the same date. The Plaintiff also utilized procedures for absentee, early, and election voting that were separate from those procedures utilized by other elections conducted on the same date. *See*, e.g., Herren Declaration, Government Exhibit 7.

39. Prior to the May 2004 election, the Plaintiff held elections in private homes, using separate polling places from the other elections held that day. As a consequence, voters in the Plaintiff district had to travel to a county voting precinct to vote for municipal and other elections, and travel to

a private residence to vote for director elections for the Plaintiff. *See,* e.g. Zimmerman Dep. at at [sic] 94:07 to 96:20, Herren Declaration, Government Exhibit 7, 8 (describing prior practice).

40. For example, in the May 1994 election, voters living in the Plaintiff district had to travel to the county's Precinct 219 to vote in other local elections (8455 Spicewood Springs Road), and to a private residence to vote in the Plaintiff's elections (11709 Boulder Lane). This was a distance of 5.5 miles. *See* Herren Declaration, Government Exhibit 3, 15, 28, 32.

41. Travis County first used the Canyon Creek Elementary School (located within the boundaries of the Plaintiff) as a polling place for its elections in the November 1998 general election as Election Precinct 219. *See* Herren Declaration, Government Exhibit 29. Travis County changed the designation of the Canyon Creek Elementary School to Precinct 333 in 2001. *See* Herren Declaration, Government Exhibit 30.

42. However, the Plaintiff did not begin using the Canyon Creek Elementary School as a polling place until the May 2004 election. *See* Herren Declaration, Government Exhibit 8.

43. As a consequence, in the intervening May 2002 election, voters living in the Plaintiff district had to travel to two polling places to vote in both local elections and in the Plaintiff's elections on election day. These voters had to travel to the Canyon Creek Elementary School (10210 Ember Glen Drive) to vote in other local elections, and to a private residence (10741

Chestnut Ridge Road) to vote in the Plaintiff's election. These two polling places are 0.4 miles apart. Voters living in the Plaintiff had to go to yet a third polling place in order to vote in school elections. *See* Zimmerman Dep. at 94:07 to 96:20; Herren Declaration, Government Exhibit 7, 20, 30, 33.

Development in the Plaintiff

44. At the time the Plaintiff was created in 1988, the land comprising the district was undeveloped. *See* Zimmerman Dep. at 27:05 to 29:01.

45. Municipal utility districts such as the plaintiff are created for the purpose of aiding the developer of the land to build out water, wastewater and drainage utility infrastructure to allow for residential development of the land. These districts provide a legal structure for issuance of bonds to cover the costs of building such utilities, with the bonds repaid over time through the assessment of real estate taxes. *See* Collins Dep. at 17:19 to 19:05, Reilly Dep. at 102:15 to 102:18, 110:05 to 110:12, Zimmerman Dep. at 28:10 to 28:14; Ferguson Dep. at 20:14 to 20:19.

46. The Plaintiff has no employees. All of the Plaintiff's work is done by contractors, including the use of outside counsel for legal work. *See* Zimmerman Dep. at 34:24 to 35:05; Collins Dep. at 61:11 to 61:13.

47. Of the 709.7 acres presently within the Plaintiff, approximately 565 acres are developable, of which 562 have been developed already, with

the remaining 3 developable acres under contract for a commercial use. As of April 1, 2006, the Plaintiff included 1,298 platted single family lots (with 1,280 completed homes, 12 homes under construction, 6 vacant single family lots), two apartment complexes containing 848 units, one 20,000 square foot office building, and a Chevron Service Center. *See* Herren Declaration, Government Exhibit 23; Collins Dep. at 33:12 to 33:20.

48. As of February 2007, testimony from Plaintiff's directors and counsel indicated that all utility work for which the Plaintiff is responsible is completed, and that almost all of the homes under construction in the Plaintiff are now close to completion. *See* Ferguson Dep. at 60:17 to 62:02; Zimmerman Dep. at 125:01 to 125:04; Reilly Dep. at 130:18 to 131:16.

49. The Plaintiff has issued all of the bonds it intends to issue, and has not reached the bond limit authorized in its 1988 election. *See* Zimmerman Dep. at 117:10 to 117:18; Reilly Dep. at 80:23 to 81:07.

50. The Plaintiff district includes the residential neighborhood known as "Canyon Creek." *See* Collins Dep. 31:13 to 31:15; Ferguson Dep. at 26:13 to 26:21.

Census data

51. The demographer for the City of Austin has estimated that under the 1990 Census, the Plaintiff had a total population of 12 persons, of

whom all were white. *See* Expert Report of Ryan Robinson.

52. The demographer for the City of Austin has estimated that under the 2000 Census, the Plaintiff had a total population of 3,586 persons, of whom 2,872 (80.1%) were white, 54 (1.5%) were black, 197 were Hispanic (5.5%), 416 were Asian (11.6%), and 47 (1.3%) were "other." *See* Expert Report of Ryan Robinson.

The Plaintiff's Current Method of Election

53. State law provides that all elections for the Plaintiff are conducted in accordance with the Texas Election Code, except as otherwise provided in the Texas Water Code. *See* Tex. Water Code § 49.101, Tex. Elec. Code § 1.002; Amended Complaint at ¶ 6; Answer to Amended Complaint at ¶ 6.

54. State law required that the initial set of directors to the Plaintiff was to be appointed by the Texas Water Commission. State law likewise required that the temporary directors be confirmed by election at the same time the district is confirmed in its initial election in 1986 and 1988. *See* Tex. Water Code § 54.022; Tex. Water Code § 49.102. Plaintiff has, as required by state law, held its bond and its operation and maintenance tax authorizing elections in 1986 and 1988. *See* Tex. Water Code §§ 49.106, 49.107.

55. As required by state law, the Plaintiff is governed by a board of five directors. *See* Tex. Water Code § 54.101.

56. As required by state law, to be qualified to serve as a director of the Plaintiff, a person shall be at least 18 years old, a resident citizen of the State of Texas, and either own land subject to taxation in the district or be a qualified voter within the district. *See* Tex. Water Code § 54.102; Reilly Dep. at 87:12 to 87:17, 98:20 to 99:11.

57. Directors of the board of the Plaintiff are elected, as required by state law. *See, e.g.,* Tex. Water Code § 49.103(b).

58. Directors of the board of the Plaintiff serve four-year terms, as required by state law. *See* Tex. Water Code § 49.103(a); Reilly Dep. at 89:25 to 90:2.

59. Directors of the Plaintiff serve staggered terms, as required by state law. The Plaintiff has three directors elected in one even-numbered year, and two directors elected in the next even numbered year. *See* Tex. Water Code § 49.102(h); Reilly Dep. at 89:18 to 90:06.

60. As required by state law, the Plaintiff holds an election on a uniform election date, at the same time as a number of other local elections. Elections are held on the second Saturday in May of each even-numbered year to elect the appropriate number of directors. *See* Tex. Water Code § 49.103(b), Tex. Elec. Code § 41.001(a)(1); Tex. Elec. Code § 41.0053; Reilly Dep. at 104:07 to 104:21.

61. Elections for directors of the Plaintiff are conducted at-large throughout the entire territory of the Plaintiff. Plaintiff does not presently

utilize subdistricts for election of its directors, and thus does not have to engage in redistricting. *See* Reilly Dep. at 88:20 to 89:01.

62. The Plaintiff's directors are not presently elected by numbered posts or numbered places. *See* Reilly Dep. at 89:07 to 89:12. Hence, voters in director elections for the Plaintiff presently can "single-shot" vote for candidates for director positions, *i.e.*, they can cast one vote, for each position, or less than all positions, that are up for election. *See,* e.g., Herren Declaration, Government Exhibit 20 ("Vote for none, one, two or three.").

63. There are no primary elections for director positions for the Plaintiff, only a single general election, as required by state law. *See* Tex. Elec. Code § 144.001, 144.002; Reilly Dep. at 89:13 to 89:17.

64. As required by state law, candidates for the Plaintiff's director positions do not run according to affiliation with a political party, but instead run as independents in non-partisan elections, as required by state law. *See* Tex. Elec. Code §§ 1.005(9), 144.001, 144.002; Reilly Dep. at 89:10 to 89:12.

65. To be elected as a director of the Plaintiff, a candidate must receive more votes than any other candidate for the office, as required by state law. In other words, elections for the Plaintiff are conducted by plurality-vote, so that the persons with the highest numbers of votes for each position are elected, irrespective of whether or not the candidate receives a majority

of the votes cast. Thus, there is no majority-vote requirement and the Plaintiff does not hold run-off elections for director positions, absent a tie vote. *See* Tex. Elec. Code §§ 2.001, 2.002; Reilly Dep. at 89:2 to 89:6, 90:08 to 90:10.

66. Candidates for the Plaintiff's director positions qualify to run for office by filing an application with the secretary of the governing body, as required by state law. *See* Tex. Elec. Code § 144.003, 144.004; Reilly Dep. at 87:18 to 88:04.

67. Where the Plaintiff certifies that its candidates for office are unopposed by the qualifying deadline for the election in question, it may cancel the election under state law. *See* Tex. Elec. Code § 2.051 to 2.054.

68. As required by state law, vacancies in director positions on the board of the Plaintiff are filled by appointment by the remaining members of the board of directors of the Plaintiff, not by special election. *See* Tex. Water Code §§ 49.105, 54.103; Reilly Dep. at 88:05 to 88:19; Collins Dep. at 140:14 to 140:24.

69. The polling hours for the Plaintiff's elections (7 a.m. to 7 p.m.) are fixed by state law. *See* Tex. Elec. Code § 41.031.

70. The determination of who is a qualified voter and eligible to vote in Plaintiff's elections is defined by state law. *See* Tex. Elec. Code §§ 11.001 to 11.002.

The Plaintiff's Submissions Under Section 5

71. On November 26, 1986, the Attorney General received the Plaintiff's first submission under Section 5 of the Voting Rights Act. In that submission, the Plaintiff sought preclearance under § 5 for its creation; for the procedures for conducting its December 13, 1986, confirmation, directors, bond, and maintenance tax election; for bilingual election procedures; for its implementation schedule; and for the establishment of a polling place. The Attorney General notified the Plaintiff that he interposed no objection to the submitted voting changes on January 26, 1987. *See* Herren Declaration, Government Exhibit 1 (USDOJ File 1986-1537).

72. On April 11, 1988, the Attorney General received the Plaintiff's second submission under Section 5 of the Voting Rights Act. In that submission, the Plaintiff sought preclearance for its re-creation; for the procedures for conducting its May 7, 1988, confirmation, directors, bond, and maintenance tax election; for the establishment of a polling place, for bilingual election procedures; and for the use of paper ballots. The Attorney General notified the Plaintiff that he interposed no objection to the submitted voting changes on June 10, 1988. *See* Herren Declaration, Government Exhibit 2 (USDOJ File 1988-1404).

73. On April 10, 1990, the Attorney General received the Plaintiff's third submission under Section 5 of the Voting Rights Act. In that submission, the Plaintiff sought preclearance for

changes in its polling place and absentee voting location. The Attorney General notified the Plaintiff that he interposed no objection on June 11, 1990. *See* Herren Declaration, Government Exhibit 3 (USDOJ File 1990-1423).

74. On April 5, 1996, the Attorney General received the Plaintiff's fourth submission under Section 5 of the Voting Rights Act. In that submission, the Plaintiff sought preclearance for a change in its polling place. The Attorney General notified the Plaintiff that she interposed no objection on June 3, 1996. *See* Herren Declaration, Government Exhibit 4 (USDOJ File 1996-1732).

75. On June 10, 1996, the Attorney General received its fifth submission from the Plaintiff under Section 5 the Voting Rights Act. In that submission, the Plaintiff sought preclearance for its general election notice procedures and for the cancellation of its general election. The Attorney General notified the Plaintiff that she interposed no objection on August 1, 1996. *See* Herren Declaration, Government Exhibit 5 (USDOJ File 1996-2595).

76. On March 27, 1998, the Attorney General received the Plaintiff's sixth submission under Section 5 the Voting Rights Act. In that submission, the Plaintiff sought preclearance for an annexation into the Plaintiff (of approximately 2.486 acres) and for a polling place change. The Attorney General notified the Plaintiff that she interposed no objection on May 19, 1998. *See* Herren Declaration, Government Exhibit 6 (USDOJ File 1998-1264).

77. On March 27, 2002, the Attorney General received the Plaintiff's seventh submission under Section 5 of the Voting Rights Act. In that submission, the Plaintiff sought preclearance for a polling place change. The Attorney General notified the Plaintiff that he interposed no objection on May 24, 2002. *See* Herren Declaration, Government Exhibit 7 (USDOJ File 2002-1980).

78. On February 27, 2004, the Attorney General received the Plaintiff's eighth submission under Section 5 of the Voting Rights Act. In that submission, the Plaintiff sought preclearance for joint election procedures with Travis County, Texas, including use of the county's election day polling place, and the use of the county's early voting locations, hours and voting method. The Attorney General notified the Plaintiff that he interposed no objection on April 8, 2004. *See* Herren Declaration, Government Exhibit 8 (USDOJ File 2004-0946).

Changes Submitted by Travis County and the City of Austin

79. Travis County and the City of Austin have a made a number of changes in joint election procedures that have affected elections for the Plaintiff, and have submitted those changes to the Attorney General for preclearance under Section 5; the Attorney General has interposed no objection to those changes.

80. Travis County split the election precinct in which the Plaintiff sits (Precinct 333) into two precincts in 2005. The County left Precinct 333

at the Canyon Creek Elementary School, and created new Precinct 343 at Cantebrea Crossing, 8021 RR 621 N. Part of the Plaintiff district is included in both Precinct 333 and 343. The County submitted this change to the Attorney General under Section 5, and he interposed no objection. *See* DeBeauvoir Dep., Ex. 1.

81. For the May 2006 election, the City of Austin consolidated the two election precincts that encompass the Plaintiff (Precinct 333 and 343) into one polling place at the Canyon Creek Elementary School. The City submitted this change to the Attorney General for review under Section 5, and he interposed no objection. *See* Herren Declaration, Government Exhibit 31.

82. Travis County submitted the joint election agreement with the Plaintiff for the May 2004 election as well as several early voting location changes for that election to the Attorney General for review under Section 5, and he interposed no objection. *See* DeBeauvoir Dep. Ex. 2, 3, 4.

83. Travis County submitted several changes in early voting locations for the May 13, 2006, joint election to the Attorney General for review under Section 5, and he interposed no objection. *See* DeBeauvoir Dep. Ex. 7, 8.

The Plaintiff Is Not Significantly Burdened by Section 5

84. The last submission the Plaintiff made under Section 5 to the Attorney General seeking preclearance of voting changes was on February 26, 2004, in connection with its 2004 directors' election, and has made no submissions in the more than three years since. *See* Herren Declaration at ¶ 51.

85. The Plaintiff made no submission under Section 5 to the Attorney General seeking preclearance of voting changes in connection with its most recent May 2006 election, or in connection with its next election, scheduled for May 10, 2008. *See* Herren Declaration at ¶ 52; Tex. Water Code § 49.103(b), Tex. Elec. Code § 41.001(a)(1).

86. As of May 15, 2007, the Plaintiff has no submissions under Section 5 pending before the Attorney General seeking preclearance of any voting changes. *See* Herren Declaration at ¶ 53.

87. The Plaintiff has not identified any voting changes that it presently desires or plans to implement. *See* Amended Complaint at ¶ 12. Two of Plaintiff's directors, who testified as Rule 30(b)(6) witnesses for the Plaintiff, stated that aside from a polling place change in 2004, there really have been no voting changes in the Plaintiff, nor are any voting changes anticipated in the future. *See* Zimmerman Dep. at 69:13 to 69:16, 144:21 to 145:09; Ferguson Dep. at 69:23 to 70:02.

88. The Plaintiff has not identified any voting changes that Section 5 has prevented it from adopting. The Plaintiff has admitted that "it is presently unaware of any particular instance in which the District has explicitly considered and then refrained from making a change with respect to voting because of the preclearance requirements of Section 5". *See* Government Exhibit 34. Two of Plaintiff's directors, testified under Rule 30(b)(6), and stated that they could not recall such a situation. *See* Zimmerman Dep. at 76:08 to 76:23; Ferguson Dep. at 70:15 to 70:19.

89. The Attorney General's records do not reflect any evidence that Section 5 has prevented Plaintiff from implementing any proposed voting changes. See Herren Declaration at 54.

90. As described above, most features of the Plaintiff's election system are determined by state law, and are not discretionary, and thus there are relatively few types of voting changes that the Plaintiff has discretion under state law to implement on its own.

91. Under the joint election agreements between the Plaintiff and Travis County, it appears that many changes in election procedures affecting joint elections with the Plaintiff likely will be submitted for preclearance under Section 5 by the County.

92. The Plaintiff has held only eight elections in its history. Plaintiff has not held any types of elections other than director elections since 1988, and there is no present indication that it will

have need to do so in the future. *See* Tex. Water Code 49.106, 49.107.

93. The Plaintiff has made only eight Section 5 submissions in its history.

94. There have been no discussions of annexation by the board of the Plaintiff since 2002, and there is no present foreseeable need to annex. *See* Zimmerman Dep. 97:09 to 97:16.

95. There is only one public building in the Plaintiff, Canyon Creek Elementary School, and that building is currently used as the polling place for the Plaintiff. *See* Zimmerman Dep. at 94:08 to 94:09, 119:01 to 119:05.

96. The Plaintiff's witnesses testified that they were pleased with Travis County's conduct of its elections under the joint election agreements in 2004 and 2006 and that they expect that Travis County will administer the Plaintiff's May 2008 election, and will keep the polling place at the school. *See* Reilly Dep. 43:13 to 44:05; Ferguson, Dep. at 44:17 to 45:01, 49:14 to 50:13, 69:23 to 70:10; Zimmerman Dep. at 69:06 to 69:12; 100:22 to 101:04.

97. The previous attorney for the Plaintiff, who made seven of the Plaintiff's eight submissions to the Attorney General of voting changes under Section 5, testified that preparation of such submissions "don't take very long." *See* Collins Dep. 25:01 to 25:14.

98. Expert witness Terry L. Musika produced a chart for this case showing that Plaintiff has spent an average of $30,056 on legal fees annually during

the period from 1989 to 2005, out of an average total annual expenditure by Plaintiff of $548,338. *See* Report of Terry Musika at Ex. E.

99. Mr. Musika further estimated that Plaintiff's average annualized estimated cost of making preclearance submissions of voting changes under Section 5 was $223. *See* Report of Terry Musika, at 10-11.

100. The Plaintiff will eventually be dissolved, once its debts are paid off at the end of bond payment cycle or are assumed by the City of Austin. *See* Zimmerman Dep., at 116:16 to 117:09, 124:17 to 124:25; Ferguson Dep., Part 2, at 57:22 to 58:02

Section 5 Process

101. The Attorney General endeavors to make the administrative review process for Section 5 submissions as efficient, convenient and reasonable as possible for jurisdictions covered by its requirements. *See* Herren Declaration at ¶ 39.

102. The Attorney General has long-standing published procedures that describe many aspects of the Section 5 review process. *See* 28 C.F.R. Part 51. These procedures were first promulgated in 1971. *See* 36 Fed. Reg. 18186 (Sept. 10, 1971). *See* Herren Declaration at ¶ 40.

103. The Attorney General also provides a website that discusses the Section 5 process (http://www.usdoj.gov/crt/voting/). *See* Herren Declaration at ¶ 41.

104. Section 5 itself allows submissions to be made by the "chief legal officer" or "other appropriate official" of a jurisdiction. 42 U.S.C. 1973c.

105. The Attorney General's procedures likewise provide that submissions can be made by the "chief legal officer," "other appropriate official of the submitting authority," or "any other authorized person on behalf of the submitting authority." 28 C.F.R. 51.23.

106. Hence, neither Section 5 nor the Attorney General's Procedures require that submissions for preclearance be made by attorneys. Many of the submissions received by the Attorney General under Section 5 are in fact neither prepared nor submitted by attorneys. Moreover, based on the Attorney General's experience in administering the Section 5 process, the vast majority of submissions do not require an attorney in order to prepare the submission. *See* Herren Declaration at ¶ 44.

107. The Attorney General provides a toll-free telephone number that submitting officials can call to speak with Department of Justice staff members, who are available to walk persons through what needs to be done to make a submission under Section 5. *See* Herren Declaration at ¶ 45.

108. The Attorney General has a long-established procedure, dating from 1971, for jurisdictions to request expedited consideration of voting changes. *See* 28 C.F.R. 51.34, 36 Fed. Reg. 18186 (September 10, 1971). The Attorney General makes every effort to accommodate covered states and local jurisdictions that experience

emergencies prior to elections for which expedited consideration of submissions of voting changes is required. Situations calling for expedited consideration can include events such as fires or natural disasters that affect which polling places can be used in an election, or preelection litigation that threatens to stop the conduct of an election. The Attorney General not infrequently makes emergency preclearance decisions within 24 hours on submissions in such situations. *See* Herren Declaration at ¶ 46.

109. The Attorney General has long accepted submissions from jurisdictions via overnight delivery. The Plaintiff availed itself of this option in a 1996 submission, which it sent by overnight delivery to the Attorney General (USDOJ File 1996-1732). *See* Herren Declaration at ¶ 47, Government Exhibit 4.

110. For some years, the Department has provided a means for jurisdictions to make submissions for preclearance via facsimile. The Plaintiff availed itself of this option in a 2002 submission, which it faxed to the Attorney General (USDOJ File 2002-1980). *See* Herren Declaration at ¶ 48, Government Exhibit 7.

111. For some time, the Attorney General has also provided jurisdictions a means to submit additional information on pending Section 5 submissions through sending attachments to an email address. *See* Herren Declaration at ¶ 49.

112. Recently, the Attorney General has expanded his internet website to allow jurisdictions to make Section 5 submissions by means of an

entirely internet-based format (http://wd.usdoj.gov/crt/voting/sec_5/evs/). *See* Herren Declaration at ¶ 50.

Jurisdictions Eligible to File Bailout Actions

113. Prior to the 1982 amendments to Section 4(a) of the Voting Rights Act, that went into effect in 1984, there were approximately 91 jurisdictions that were eligible to file actions under Section 4(a) seeking to bail out of the temporary provisions of the Voting Rights Act. The jurisdictions eligible to file such actions were those that had individual determinations published in the Federal Register that they were covered by the temporary provisions of the Voting Rights Act. *See* 46 Fed. Reg. 870-01 (Jan. 5, 1981). *See* Herren Declaration at ¶ 56.

114. The 1982 amendments to Section 4(a) of the Voting Rights Act, that went into effect in August 1984, broadened the number of jurisdictions that could file actions seeking to bail out under Section 4(a) to at least 896 jurisdictions. These jurisdictions break down as follows – there are 9 states covered as a whole by Section 5; there are at least 821 counties, parishes and independent cities that supervise voter registration within those 9 states; and there are 66 jurisdictions that are separately covered by Section 5 in 7 other states. *See* 28 C.F.R. Part 51 Appendix (listing jurisdictions). *See* Herren Declaration at ¶ 57.

115. To date, 14 of these 896 jurisdictions have successfully bailed out under Section 4(a) since

1984, with the agreement of the Attorney General. All of these 14 jurisdictions were counties and independent cities in Virginia (the counties of Augusta, Botetourt, Essex, Frederick, Greene, Pulaski, Roanoke, Rockingham, Shenandoah, and Warren and the independent cities of Fairfax, Harrisonburg, Salem and Winchester). *See* Herren Declaration at ¶ 58.

116. If the opportunity to seek bailout under Section 4(a) was extended to the smallest political subjurisdictions that conduct elections in every covered state and covered county, like the Plaintiff, then well more than 10,000 jurisdictions in those covered States and counties could file bailout actions in this Court. *See* Herren Declaration at ¶ 59.

The Plaintiff Does Not Meet the Threshold Requirement to Bail Out

117. The Plaintiff is not a State.

118. The Plaintiff is not a county or parish.

119. The Plaintiff's name does not appear on a list of jurisdictions with separate coverage determinations under the temporary provisions of the Voting Rights Act. *See* 28 C.F.R. Part 51, Appendix.

120. In the State of Texas, registration for voting is conducted under the supervision of the State's 254 counties. A county official is designated by state law as the voter registrar for each county in Texas, usually the tax-assessor collector. *See* Tex. Elec. Code §§ 12.001, 12.031, 13.002, 13.071, 13.072, 13.073, 13.101.

121. Texas uses a unitary voter registration system under which a citizen may register to vote once, in order to be able to vote in elections for state, county, and municipal offices, as well as for special district offices, such as the Plaintiff. *See* Tex. Elec. Code § 11.001.

122. The Plaintiff uses Travis County's voter registration list for its elections, including the county's determinations of which registered voters reside in the Plaintiff. *See* Reilly Dep. at 71:08 to 71:20; Collins Dep. at 66:04 to 67:08, 104:10 to 104:15, 147:17 to 150:16; DeBeauvoir Dep. at 66:04 to 66:16.

123. In Travis County, the voter registrar for all elections, including those of the Plaintiff, is a county official, the Travis County tax assessor-collector. *See* DeBeauvoir Dep. at 44:19 to 45:17; Tex. Elec. Code § 12.001.

124. Registration for voting is not conducted under the supervision of the Plaintiff. *See* Reilly Dep. at 67:01 to 67:05; Collins Dep. at 66:04 to 67:08, 125:02 to 125:07.

Respectfully submitted,

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Date: May 15, 2007

Exhibit 7

Weil, Gotshal & Manges LLP
MEMORANDUM

May 19, 2006

TO: Members of the Board
Frank Reilly

From: Gregory S. Coleman

Re: Possible Challenge to Preclearance Procedures

As some of you already know, I have been working closely with various legal groups and members of Congress in connection with the expected reauthorization of the Voting Rights Act, and I recently testified before the Senate Judiciary Committee on the subject. One of the issues at stake that continues to affect the district is the preclearance provisions contained in section 5 of the Voting Rights Act. Section 5 does not really do anything that other provisions in the Voting Rights Act don't already do, but, as you know, it does require you to preclear with the U.S. Department of Justice each and every change in voting procedures or practices that you make. This preclearance process is both time-consuming and expensive. I have been active in expressing my concerns that preclearance is no longer justifiable. It imposes huge costs and burdens on small political subdivisions in covered areas, and yet the DOJ rarely interposes objections. In other words, it is a $100-million-a-year bureaucracy that exists largely to

process paperwork, but without any real role in the true purposes of the Voting Rights Act.

Because of my continuing representation of the district in fighting the double-taxation issue, for which we continue to await a decision, I have mentioned some of my ideas to representatives of the district and, if the district were interested in pursuing legal relief from the preclearance process, I would be very interested in helping you to do that. Specifically, we would be interested in pursuing on the district's behalf a complaint that seeks a declaration that the district is no longer subject to the preclearance provisions, either because it is entitled to "bail out" of the coverage under section 4 of the VRA or because the continued application of the preclearance provisions is an unconstitutional infringement on the sovereignty of the district. The fact is that the district has never discriminated against anyone in voting, and there is no justification for continuing the application of a process that keeps the district under a cloud by requiring it to justify every little change it makes.

I would be very interested in discussing this possibility with you at your next board meeting. Unfortunately, I will be in Washington on client business on Tuesday and will not he able to attend personally. My colleagues, Chris Ward and J.P. Lund, both of whom are very up to date on these issues will be glad to visit with you and answer any questions you may have.

If this kind of a challenge is something you as a board would be interested in, I would ask you to pass a resolution authorizing us to file suit on your behalf to seek a declaratory judgment that the district is no longer subject to preclearance under section 5 of the Voting Rights Act. As with our prior representation, we would be pleased to represent the district on a pro bono basis.

I look forward to continuing to work with each of you.

CERTIFICATE FOR RESOLUTION

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

The undersigned officer of the Board of Directors of Northwest Austin Municipal Utility District No. 1 hereby certifies as follows:

1. The Board of Directors of Northwest Austin Municipal Utility District No. 1 convened in regular session on the 14th day of June 2006, at Peace Lutheran Church, 10625 North F.M. 620, Austin, Texas and the roll was called of the duly-constituted officers and members of the Board, to wit:

– President

– Vice President

– Secretary

– Treasurer

– Assistant Secretary/Treasurer

all of said persons were present, except , thus constituting a quorum. Whereupon, among other business, the following was transacted at the meeting: a

RESOLUTION AUTHORIZING GREGORY S. COLEMAN OF WEIL, GOTSHAL & MANGES, L.L.P. TO INSTITUTE LITIGATION AGAINST THE DEPARTMENT OF JUSTICE AND/OR APPROPRIATE FEDERAL OFFICIALS REGARDING ENFORCEMENT OF SECTION 5 OF THE VOTING RIGHTS ACT AGAINST THE DISTRICT

was introduced for the consideration of the Board. It was then duly moved and seconded that the Resolution be adopted, and, after due discussion, the motion, carrying with it the adoption of the Resolution, prevailed and carried by majority of the Board.

2. A true, full and correct copy of the Resolution adopted at the meeting described in the above paragraph is attached to this certificate; the Resolution has been duly recorded in the Board's minutes of the meeting; the persons named in the above and foregoing paragraph are the duly chosen, qualified and acting officers and members of the Board as indicated therein; each of the officers and members of the Board was duly and sufficiently notified officially and personally, in advance, of the time, place and purpose

of the aforesaid meeting and that the Resolution would be introduced and considered for adoption at the meeting, and each of the officers and members consented, in advance, to the holding of the meeting for such purpose; the meeting was open to the public as required by law; and public notice of the time, place and subject of the meeting was given as required by Chapter 551 of the Government Code.

SIGNED AND SEALED the 14th day of June, 2006.

(SEAL)

_____

_____, President
Board of Directors

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

This instrument was acknowledged before me on June 14, 2006 by _____, President of the Board of Directors of Northwest Austin Municipal Utility District No. 1, on behalf of said District.

(SEAL)

_____
Notary Public Signature

RESOLUTION AUTHORIZING GREGORY S. COLEMAN OF WEIL, GOTSHAL, & MANGES, L.L.P. TO INSTITUTE LITIGATION AGAINST THE DEPARTMENT OF JUSTICE AND/OR APPROPRIATE FEDERAL OFFICIALS REGARDING ENFORCEMENT OF SECTION 5 OF THE VOTING RIGHTS ACT AGAINST THE DISTRICT

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

WHEREAS, Northwest Austin Municipal Utility District No. 1 (the "District") has been duly and lawfully created and operates pursuant to Chapters 49 and 54 of the Texas Water Code; and

WHEREAS, the District is subject to the provisions of Section 5 of the federal Voting Rights Act, and as such, must request preclearance from the U.S. Department of Justice for every change affecting voting; and

WHEREAS, the preclearance requires the District to expend taxpayer funds to comply with the federal Voting Rights Act; and

WHEREAS, there have never been any allegations that the District has violated the federal Voting Rights Act, and the U.S. Department of Justice has granted all requests for preclearance.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF NORTHWEST

AUSTIN MUNICIPAL UTILITY DISTRICT NO. 1 THAT:

Section 1: Gregory S. Coleman of Weil, Gotshal & Manges, L.L.P. is hereby authorized to institute litigation against the U.S. Department of Justice and/or appropriate Federal officials regarding enforcement of Section 5 of the Voting Rights Act against the District.

Section 2: The District's secretary is hereby directed to file a copy of this resolution with the District's records.

PASSED AND APPROVED on the 14th day of June, 2006.

_____

_____, President
Board of Directors

ATTEST:

_____

_____, Secretary
Board of Directors

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,
401 W. 15th Street
Suite 850
Austin, Texas 78701
Plaintiff,

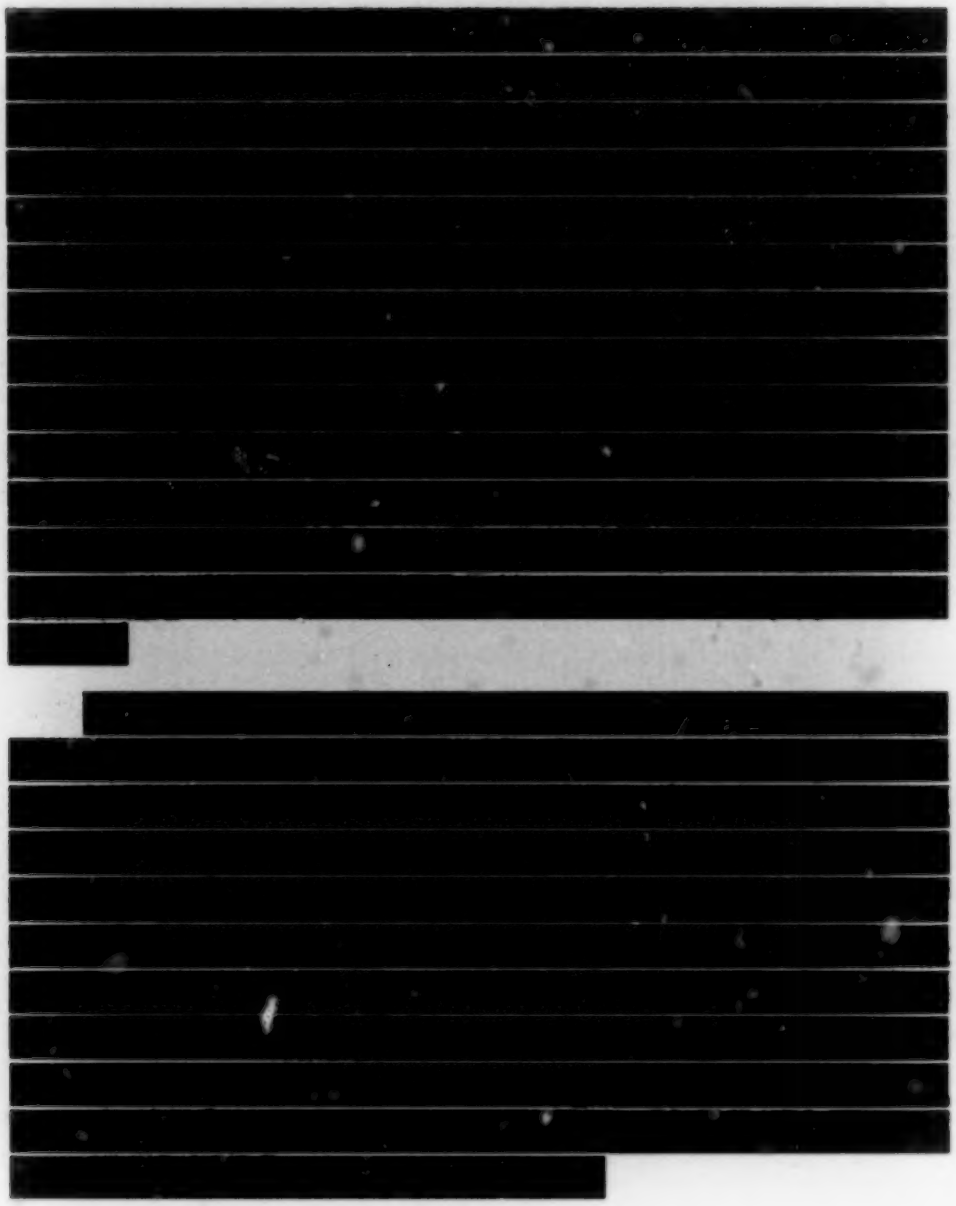
v.

ALBERTO GONZALES,
Attorney General
of the United States,
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530,
Defendant.

Civil Action No.
1:06-CV-01384
(DST, PLF, EGS)

PLAINTIFF'S RESPONSE TO STATEMENTS OF MATERIAL FACTS BY DEFENDANT ALBERTO GONZALES AND DEFENDANT INTERVENORS TEXAS STATE CONFERENCE OF NAACP BRANCHES, AUSTIN BRANCH OF THE NAACP, RODNEY LOUIS, NICOLE LOUIS, WINTHROP GRAHAM, YVONNE GRAHAM, WENDY RICHARDSON, JAMAL RICHARDSON, MARISA RICHARDSON, NATHANIEL LESANE, PEOPLE FOR THE AMERICAN WAY, JOVITA CASARES, ANGIE GARCIA, OFELIA ZAPATA, LISA DIAZ, DAVID DIAZ, AND GABRIEL DIAZ.

[redacted]



Response to Numbered Paragraphs in Statement of Material Facts by Defendant Alberto Gonzales

1. Not disputed.
2. Not disputed.
3. Not disputed.
4. Not disputed.
5. Not disputed.
6. Not disputed.
7. Not disputed.
8. Not disputed.
9. Not disputed.
10. Not disputed.
11. Not disputed.
12. Not disputed.
13. Not disputed.
14. Not disputed.
15. Not disputed.
16. Not disputed.
17. Not disputed.
18. Not disputed.
19. Not disputed.
20. Not disputed.

21. Not disputed.

22. Disputed but not material. The relevant historical period for this suit, which was filed on August 4, 2006, began on August 4, 1996, and nothing before that date is considered material under the bailout criteria. 42 U.S.C. §1973*b*(a)(1). The district has never adopted numbered place voting, as made clear by the orders calling for the director elections, which state that voters may vote for any number of persons from zero up to the number of seats to be filled that year on the five-person board. Perales Decl. Ex. D. A 1994 canvass report did purport to assign place numbers to the three candidates who had run for the three board seats open that year, but it appears that such numbering was either a mistake or administrative shorthand for identifying which three of the five staggered terms expired that year. Pl. Mem. In Opposition to Motions for Summary Judgment Ex. 1. The purported designations on the canvass report did not and could not have affected how balloting actually occurs in the district, as illustrated by canvass reports from later, contested elections in which the number of candidates exceeded the number of available seats on the board. *E.g.*, Pl. Mem. in Support of Mot. for Summary Judgment Ex. 37.

23. Not disputed.

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111. Not disputed.

112. Not disputed.

113. Not disputed.

114. Not disputed that at least 896 jurisdictions can file actions seeking bailout under the 1982 amendments to §4(a) but disputed to the extent this paragraph asserts the legal conclusion

that bailout is limited only to the types of entities listed in this paragraph.

115. Not disputed.

116. Not disputed.

117. Not disputed.

118. Not disputed.

119. Not disputed.

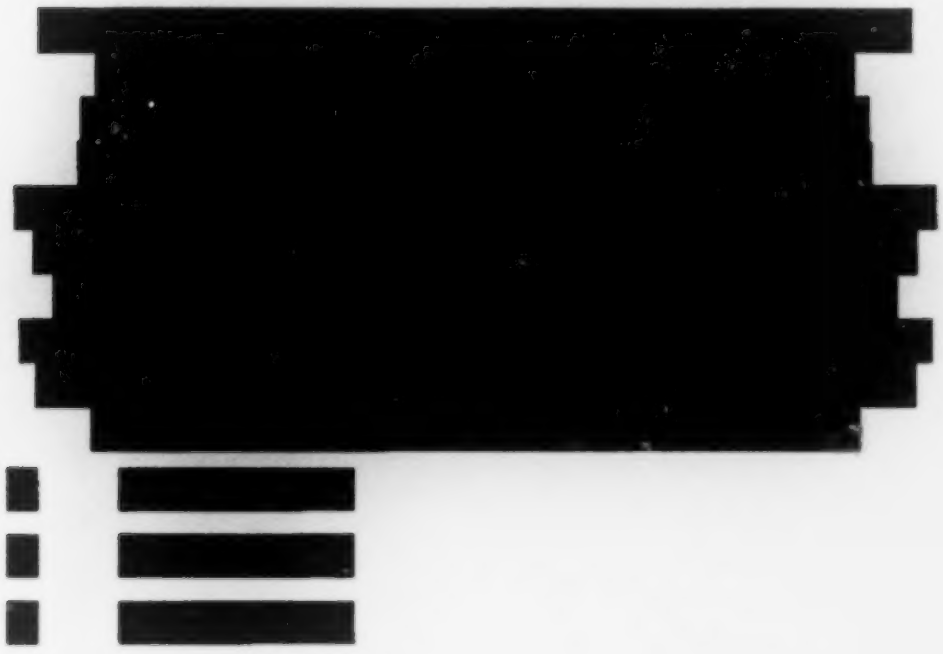
120. Not disputed.

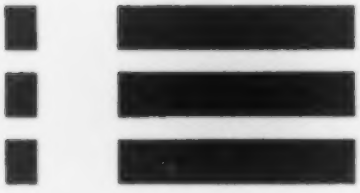
121. Not disputed.

122. Not disputed.

123. Not disputed.

124. Not disputed.





DATED: June 15, 2007 Respectfully submitted:

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Utility District No. One

APPELLANT'S BRIEF

1/4

(5)

No. 08-322

Supreme Court, U.S.
FILED
DEC 9 - 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

-v.-

MICHAEL B. MUKASEY, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

APPELLANT'S BRIEF OPPOSING MOTIONS TO AFFIRM

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INTRODUCTION

The America that has elected Barack Obama as its first African-American president is far different than when §5 was first enacted in 1965. Appellees barely acknowledge the deep-rooted societal change, preferring to assume that conditions remain similarly dire despite overwhelming evidence to the contrary. There is no warrant for continuing to presume that jurisdictions first identified four decades ago as needing extraordinary federal oversight through §5 remain uniformly incapable or unwilling to fulfill their obligations to faithfully protect the voting rights of all citizens in those parts of the country.

As the Court recognized in upholding previous enactments of §5, it was the persistent strategy of staying one step ahead of court-ordered remedies employed by earlier generations of officials that made case-by-case enforcement of voting rights impossible and justified §5's unparalleled federal intrusion into local government as a temporary measure. Congress did not adduce such a pattern enduring to 2006, and appellees cannot demonstrate one in the legislative record. While instances of voting discrimination still occur, they are by no means confined to covered jurisdictions, and citizen voting rights are ably protected in covered and noncovered jurisdictions alike by permanent protections enshrined in the VRA, particularly §2.

The Court's precedent makes clear that Congress cannot distort the federalist structure by wielding the

biggest stick at its disposal simply because preempting every local change affecting voting is the most convenient way of quashing those few that violate the Reconstruction Amendments. Just as Congress could not require preclearance of state enactments affecting religion, the elderly, or the disabled without demonstrating the congruence and proportionality of such a broad prophylactic, it cannot continue to impose a federal veto over changes affecting voting on the contemporary record.

At the very least, the Court should recognize that the VRA itself contains a mechanism with the potential to trim §5's overbroad contours. The bailout provision only has that potential if applied—in accordance with its text—to permit any political subdivision that demonstrates a history of compliance to exempt itself from preclearance. The restrictive, virtually useless interpretation of bailout adopted by the district court makes a mockery of the congressional promise of bailout availability and cannot on that basis save §5.

ARGUMENT

I. The Court Should Review the Proper Interpretation of the Bailout Statute.

Congress intended the bailout statute as a meaningful mechanism for political subdivisions to excuse themselves from the burdens of preclearance by showing a ten-year track record of voting-rights

compliance, not, as the district court interpreted it, as a hollow promise, inaccessible to any but a few political subdivisions in a single commonwealth. The district court's interpretation of §4(a), 42 U.S.C. §1973*b*(a) (2006), violates statutory text and this Court's precedent. Worse, that interpretation has numerous unintended consequences throughout the VRA and makes it impossible for §5, 42 U.S.C. §1973*c*, to be held congruent and proportional.

Appellees acknowledge that affirming the holding that the district is ineligible to pursue bailout requires treating "political subdivision" as a defined term in the VRA. But the only definition of "political subdivision" excluding entities like the district is in §14(c)(2), 42 U.S.C. §1973*l*(c)(2), which the Court has plainly held applies only for defining which entities can be designated for separate coverage. *Dougherty County, Ga., Board of Educ.* v. *White*, 439 U.S. 32, 43-44 (1978); *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 128-129 (1978); see *United States* v. *Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 554-555 (CA5 1980).

Sheffield "expressly rejected the suggestion that the city of Sheffield was beyond the ambit of §5 because it did not itself register voters and hence was not a political subdivision as the term is defined in §14(c)(2) of the Act." *Dougherty County*, 439 U.S., at 44. *Sheffield* recognized, instead, "that Congress never intended the §14(c)(2) definition to limit the substantive reach of the Act's core remedial provision once an area of a nondesignated State had been

determined to be covered." 435 U.S., at 129. Dispelling any notion that *Sheffield*'s cabining of the §14(c)(2) definition was mere dicta, *Dougherty County* noted that "Section 5 applies to all changes affecting voting made by 'political subdivision[s]' of States designated for coverage," and squarely held that §14(c)(2) did not exclude a school board from being a "political subdivision." *Dougherty County*, 439 U.S., at 43-44. Appellees cannot explain away *Dougherty County*'s explicit recognition that *Sheffield* confined §14(c)(2) to the designation context, leaving "political subdivision" a nondefined term elsewhere in the VRA. *Cf. Sheffield*, 435 U.S., at 129 ("'[P]olitical subdivision' was understood as referring to an area of the State.").

It is irrelevant that *Sheffield* and *Dougherty County* were not interpreting post-1982 §4(a). Both cases squarely considered §14(c)(2), the only possible source of a restrictive definition of "political subdivision."

City of Rome v. *United States*, 446 U.S. 156 (1980), did nothing to alter the *Sheffield-Dougherty County* cabining of §14(c)(2). *Rome* did not construe "political subdivision" in isolation. *Rome* simply applied the pre-1982 statute, which permitted bailout only by separately covered political subdivisions, a condition the city clearly failed to satisfy. 446 U.S., at 167-168.

Nor has Congress abrogated the *Sheffield-Dougherty County* limitation. When Congress altered

the bailout regime in 1982, it could easily have confined bailout to political subdivisions meeting §14(c)(2)'s definition by incorporating that definition into §4(a) or amending §14(c)(2). Congress did neither.

The district court pinned its textual analysis on the phrase "though [coverage] determinations were not made with respect to such subdivision as a separate unit," following the comma in §4(a)(1), 42 U.S.C. §1973*b*(a)(1). Intervenors embrace that analysis, but the Attorney General ignores it, perhaps recognizing that the phrase does not—grammatically or logically—incorporate §14(c)(2)'s definition into §4(a). The language is neither surplus nor limiting. Rather, it is inclusive language clarifying, after *Rome*, that separate coverage is no longer required. Congress did, as intervenors suggest it could have, simply "provide[] that 'any political subdivision' could seek bailout." Intervenors' MTA 14; see 42 U.S.C. §1973*b*(a)(1).

Moreover, treating "political subdivision" as defined by §14(c)(2), as the district court did and appellees urge this Court to affirm, has sweeping consequences throughout the VRA that cannot have been intended by Congress and that conflict with four decades of judicial interpretation. Because "political subdivision" appears numerous times throughout the VRA, applying §14(c)(2) outside the coverage context eviscerates much of the VRA's substantive protection and distorts the preclearance regime itself.

Under the Act's plain text, with "political subdivision" defined by §14(c)(2) governmental subunits other than counties (or their equivalents) could not institute a suit for judicial preclearance. See 42 U.S.C. §1973*c*(a). Noncounty subunits would, in fact, be exempt from compliance with §2's substantive prohibition of discrimination. See *id.* §1973. The definition would remove noncounty subunits from prohibitions on discriminatory voting requirements or prerequisites and tests or devices. See *id.* §1973(a); *id.* §1973*b*(a)(1). Noncounty subunits would not be prohibited from using voting qualifications or prerequisites to deny language minorities the right to vote or required to provide non-English election information. See 42 U.S.C. §1973*b*(f)(2); *id.* §1973*b*(f)(4). Neither courts nor the Attorney General could assign observers to monitor elections in any noncounty subunit. See 42 U.S.C. §1973*a*; *id.* §1973*f*(a)(1)-(2). And if observers were assigned, noncounty subunits could not petition for their removal. See 42 U.S.C. §1973*k*(c).

Aside from distorting the entire VRA by restrictively defining "political subdivision," the district court's statutory interpretation exacerbates §5's constitutional infirmity. An unworkable bailout mechanism cannot tailor §5 to be congruent and proportional. The Court should correct the district court's restrictive application of bailout, which conflicts with precedent and statutory text and intensifies preclearance's constitutional problems.

II. The Court Should Review the Constitutionality of the 2006 Enactment of §5.

Preclearance is grounded in a fundamental presumption that state and local governments uniformly cannot be trusted to enact voting laws and ordinances that comply with the Constitution and federal voting laws. Preclearance does not merely create federal substantive rights; it uniquely injects the federal executive and judiciary into state and local legislative processes, giving the federal government a direct veto over state and local enactments that "remains alone in American history in its intrusiveness on values of federalism." Persily, Options and Strategies for Renewal of Section 5 of the Voting Rights Act, 49 Howard L.J. 717, 718 (2006). But Congress acted on a record grossly insufficient to consign numerous jurisdictions, determined by data 40 years old, to seemingly perpetual federal preemption of core state lawmaking and policymaking prerogatives.

The Fifteenth Amendment gives Congress no more power to redefine substantive constitutional rights than the Fourteenth Amendment, and the 2006 enactment of §5 cannot be upheld because it is not congruent and proportional to a pattern of unconstitutional conduct sufficient to justify that extraordinary preclearance remedy. The question of the proper standard for evaluating congressional authority is far from "academic," Intervenors MTA 3, and instead presents a compelling reason for plenary review of this case. The district court's primary holding

affirmed §5's constitutionality by interpreting *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), to provide for rational-basis review and rejecting *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), as articulating a different, more stringent, and inapplicable standard. There is substantial disagreement whether *Boerne* applies a different standard than *Katzenbach*, as the district court believed, or merely elaborated on the same standard, as the district has consistently argued, *e.g.*, JS 24-25. The importance of this issue is highlighted by the degree to which appellees run from defending the standard selected by the district court. (Intervenors, oddly, impute the district court's view to the district and attack it. Intervenors MTA 22.) The district court's holding stands as important persuasive authority for other courts reviewing exercises of Congress's power to enforce the Fifteenth Amendment, and the district court is the only lower court with jurisdiction over preclearance and bailout litigation.

Appellees rely on cases upholding prior enactments of §5 as though they formed some "superprecedent" requiring a determination that the 2006 reenactment was constitutional. Appellees mistake the relevant unit of analysis—a particular congressional action reenacting §5 on a record specifically developed to support that reenactment—for a Platonistic "Section 5" divorced from the contexts of its several reenactments. *Katzenbach*, *Georgia* v. *United States*, 411 U.S. 526 (1973), and *Rome* confirm, at most, that the particular, time-limited enactment of

§5 reviewed in each case fell within Congress's power given the record on which Congress based its action.[1]

Equally important, appellees' treatment of precedent gets things exactly backward. The accretion of precedents has occurred as the evidentiary basis for congressional action has become ever more remote in time. Moreover, appellees' reliance on those precedents as sufficient to justify the 2006 (and, apparently, all future) reenactments demonstrates the bankruptcy of their argument that the quarter-century expiration provision renders the 2006 reenactment congruent and proportional. Time limits are meaningless if *Katzenbach* and *Rome* made §5 perpetually renewable without reference to contemporary evidence.

Appellees breathlessly cite the volume and breadth of the 2006 congressional record but ignore that, in the congruence-and-proportionality analysis, quality precedes quantity. To justify prophylactic legislation, Congress must first demonstrate a "history and pattern," *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368 (2001), of "conduct transgressing the . . . substantive provisions" it seeks to enforce and "tailor its legislative scheme to remedying or preventing such conduct," *Fla. Prepaid*

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[1] *Lopez* v. *Monterey County* did not address §5's constitutionality, only its reach. See 525 U.S. 266, 282-284 (1999). The Court has never decided the constitutionality of the 1982 reenactment. See Karlan, Section 5 Squared, 44 Hous. L. Rev. 1, 11-12 (2007).

Postsecondary Educ. Expense Board v. *Coll. Sav. Bank*, 527 U.S. 627, 639 (1999). Under either the Fourteenth or Fifteenth Amendment, this requires a showing of a pattern of *purposeful* discrimination. See *Shaw* v. *Reno*, 509 U.S. 630, 641 (1993); *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980) (plurality op.).

The few examples of intentional discrimination identified by Congress do not approach the defiant deviousness of the 1960s South that was the impetus for preclearance. Appellees decry the district's focus on gamesmanship as necessary to justify §5, arguing incorrectly that isolated instances of intentional discrimination are sufficient to support reenactment. The paucity of such examples within the massive congressional record speaks volumes about the proportionality of the enormous sweep of §5 to present-day conditions. But more importantly, gamesmanship is the problem to which §5 has always been tailored. State and local governments' attempts to stay one step ahead of litigation remedies was the sole reason that traditional case-by-case prosecution of discriminatory voting practices became unworkable, requiring a uniquely preemptive remedy. Contrary to appellees' assertions, the Court has expressly recognized that gamesmanship is the core problem targeted by the preemptive prophylaxis of §5. *Miller* v. *Johnson*, 515 U.S. 900, 926-927 (1995); *Beer* v. *United States*, 425 U.S. 130, 140 (1976). Without evidence that state and local governments continue to outrun the VRA, which appellees must acknowledge is not the case, there can be no showing that case-by-case challenges to

discrimination under §2 and the other substantive provisions of the VRA are somehow uniquely effective only in noncovered jurisdictions.

In addition to its gross disproportion to the utter absence of any present-day pattern of unconstitutional voting-rights deprivations of the type §5 was originally designed to address, the absence of meaningful restrictions to the provision's geographic or temporal scope makes it incongruent to any constitutional violations Congress did identify. Appellees leave largely uncontested the district's argument that the continued imposition of §5's coverage formula is arbitrary and irrational. Their limited response is that the district "ignores the historical context that led to Section 5's adoption." Mukasey MTA 23. To the contrary, the district is fully cognizant that the formula originally "identif[ied] jurisdictions with particularly egregious histories of discrimination, where especially forceful measures against voting discrimination were deemed necessary" *forty years ago*, Intervenors MTA 35; the district rejects, however, the implicit corollary that §5 may be reauthorized without any substantive consideration whether the same or a similar pattern of conditions obtained in 2006. Although it is true that covered jurisdictions had the worst records of discrimination *as of 1964 or 1972*, more contemporary records of voting-rights enforcement do not support the lines drawn 30 or 40 years ago, and Congress made no attempt to reevaluate the coverage contours drawn by our grandfathers. Appellees point to evidence of §5 enforcement, but that evidence cannot justify continued imposition of §5's

coverage formula as rationally distinguishing between covered and noncovered jurisdictions because it descends immediately into tautology. Objections and more-information requests provide no basis for comparing covered and noncovered jurisdictions because, by virtue of the outdated coverage formula, the Department of Justice preemptively monitors voting changes only in those jurisdictions that were branded as discriminatory in 1965 and 1975 and, apparently, permanently so.

The bailout mechanism of §4(a) likewise fails to tailor the geographic scope of §5, especially if interpreted restrictively to exclude entities like the district. For most covered jurisdictions, bailout is an illusory remedy, whether because, like Texas counties, they lack sufficient control over their political subdivisions even to gather the necessary information to pursue bailout, let alone compel compliance with nondiscrimination requirements, or are simply so large as to make pursuing bailout hugely cost-inefficient. The few Virginia jurisdictions that have successfully bailed out are the exceptions that prove the rule of bailout's inadequacy. Despite Virginia's unique structures of local governance that eliminate the many problems faced by jurisdictions elsewhere, only fourteen counties and cities there have sought bailout; the single California county that attempted to follow them withdrew its request because it was unable to compel subdivisions to provide necessary information.

Nor do appellees provide any argument that the seemingly infinitely extensible time limitations on §5

actually provide a meaningful restriction to its scope. The argument that §5 needed to be extended for 25 years to provide incentives for bailout, see Intervenors MTA 33 n.9, is fallacious. In light of the serial reauthorization of §5, there can be no realistic concern that a covered jurisdiction would simply rely on a putative expiration date; Congress has clearly signaled that, until this Court clarifies the limits of congressional power, §5 will continue to be extended ad infinitum in unaltered form.

Appellees unjustifiably suggest that virtually all the progress our Nation has made in combating the scourge of racial discrimination in voting can be attributed solely to §5. They imply without a scintilla of support that all this progress would be undone overnight were §5 recognized as congressional overreaching, ignoring the enormous changes in American society since 1965 or even 1982. Amazingly, they never once mention the election of Barack Obama as president, an event "momentous for the generational change it heralds . . . and the racial progress it both acknowledges and promises." Editorial, President Obama, Wash. Post, Nov. 5, 2008, at A25. Indeed, America has now become "the first majority-white democracy on this planet to anoint a black person as national leader." Zimmerman, A Victory for America, and the World, washingtonpost.com, Nov. 5, 2008, at http://tinyurl.com/6oxcpw.

The Fifteenth Amendment permits some intrusion on state prerogatives—even a significant degree under emergency circumstances like those in 1965.

But it does not abrogate federalism as a principle of constitutional structure or place state electoral management permanently into federal receivership. Time and social progress have shifted the constitutional balance away from this most intrusive prophylactic measure, and the Court should remind Congress of its obligations to respect the Constitution's federalist structure. The 2006 reenactment of §5 is not a congruent and proportional response to *present-day* voting-rights circumstances; it was rather an improper and unconstitutional extension of a response appropriate to the scope and scale of problems two generations past into a never-ending future.

CONCLUSION

The Court should note probable jurisdiction and hear this matter on the merits.

Respectfully submitted,

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December 2008

APPELLANT'S BRIEF

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No. 08-322

Supreme Court, U.S.
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In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

APPELLANT'S BRIEF

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QUESTIONS PRESENTED

1. Whether §4(a) of the Voting Rights Act, which permits "political subdivisions" of a State covered by §5's requirement that certain jurisdictions preclear changes affecting voting with the federal government to bail out of §5 coverage if they can establish a ten-year history of compliance with the VRA, must be available to any political subunit of a covered State when the Court's precedent requires "political subdivision" to be given its ordinary meaning throughout most of the VRA and no statutory text abrogates that interpretation with respect to §4(a).

2. Whether, under the Court's consistent jurisprudence requiring that remedial legislation be congruent and proportional to substantive constitutional guarantees, the 2006 enactment of the §5 preclearance requirement can be applied as a valid exercise of Congress's remedial powers under the Reconstruction Amendments when that enactment was founded on a congressional record demonstrating no evidence of a persisting pattern of attempts to evade court enforcement of voting-rights guarantees in jurisdictions covered only on the basis of data 35 or more years old, or even when considered under a purportedly less stringent rational-basis standard.

PARTIES TO THE PROCEEDINGS

Northwest Austin Municipal Utility District Number One is the only appellant. The appellees are Eric H. Holder, Jr., in his official capacity as Attorney General of the United States and these additional appellees that intervened as defendants below: the Austin Branch of the NAACP; Jovita Casares; David, Gabriel, and Lisa Diaz; Angie Garcia; Winthrop and Yvonne Graham; Nathaniel Lesane; Nicole and Rodney Louis; People for the American Way; Jamal, Marisa, and Wendy Richardson; the Texas State Conference of NAACP Branches; Travis County, Texas; and Ofelia Zapata.

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Opinion Below

The district court's opinion, reported at 573 F.Supp.2d 221, is reprinted at J.S.App.1-183.

Jurisdiction

The district court had jurisdiction under 42 U.S.C. §§1973*b* and 1973*l*. The district court issued its judgment on May 30, 2008, and a notice of appeal was timely filed. This Court has jurisdiction under 42 U.S.C. §1973*b*(a)(5) and 28 U.S.C. §1254.

Constitutional Provisions and Statutes Involved

Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution; the Fifteenth Amendment to the United States Constitution; Sections 4, 42 U.S.C. §1973*b*, and 5, 42 U.S.C. §1973*c*, of the Voting Rights Act, as amended, are reprinted at J.S.App.193-208.

Statement of the Case

In the past 44 years, nearly every facet of voting rights has changed in America. Voter registration, voter turnout, and representation in electoral offices have increased dramatically among African Americans, Hispanics, and other minorities. The country has its first African-American president, who received a larger percentage of the white vote than each of the previous two Democratic presidential nominees.

About the only thing that has not changed is §5 of the Voting Rights Act, which—based on an illegitimate presumption of resolute intransigence and endemic discriminatory animus—continues to impose an unparalleled federal intrusion on the contemporary generation in certain parts of the country. Even the data that determines the geographic sweep of §5's preclearance regime has not changed in 37 years. Congress had the opportunity, and obligation, in 2006 to reexamine §5's continued appropriateness, or at least update the coverage formula. It made no serious effort to do so.

The record Congress amassed in 2006, though voluminous in quantity, is not of the quality to demonstrate that §5 remains a valid exercise of Congress's enforcement powers. Congress cannot continue to impose the most intrusive inversion of our federalist structure on jurisdictions identified based solely on decades-old data when every indication demonstrates that the original emergency has now passed.

At the very least, jurisdictions like appellant Northwest Austin Municipal Utility District Number One that can demonstrate a history of respect for the voting rights of all residents must be allowed to remove the burden of federal preclearance. Congress made that opportunity available by statute, but the constricted reading of the bailout provision employed by the Attorney General and now adopted by the district court will prevent them from being able to even make the attempt. A working bailout

mechanism is the only possible means of trimming §5's overbroad coverage to anything resembling a constitutionally appropriate scope.

1. The VRA and the 2006 Reenactment of §5

Congress enacted the landmark Voting Rights Act of 1965 "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Before that enactment, "Congress explored with great care the problem of racial discrimination in voting," with extensive committee hearings and floor debate. *Id.*, at 308-309. The Act's primary substantive provision was the permanent, nationally applied §2, which closely tracked the Fifteenth Amendment's guarantee against denial or abridgment of the right to vote because of race or color. 42 U.S.C. §1973.

The Act's most unprecedented—still unparalleled—provision was §5, requiring certain jurisdictions to preclear changes affecting voting through either the United States District Court for the District of Columbia or the Attorney General. 42 U.S.C. §1973*c* (Supp. 4 v.2 1965-1969). Section 5 was always acknowledged as a "substantial departure . . . from ordinary concepts of our federal system." Hearings on S. 407 *et al.* Before the Subcomm. on Const. Rights of the S. Comm. on the Judiciary, 94th Cong. 536 (1975) (testimony of J. Stanley Pottinger). But, in addition to

a coverage formula intended to restrict §5's applicability to States and localities with a demonstrable history of purposeful discriminatory conduct up to at least 1964, Congress provided that §5 coverage would lapse after five years. 42 U.S.C. §1973*b* (Supp. 4 v.2 1965-1969).

The Court upheld that original enactment as a constitutionally valid response to Congress's determination "that some of the States covered by §4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees," making case-by-case enforcement of voting rights impossible. *Katzenbach*, 383 U.S., at 335. Explaining the need for §5, Attorney General Katzenbach likened the voting-rights problem in *all* the areas covered by §5 to similar problems involving school desegregation:

> "The justification for (the approval requirements) is simply this: Our experience in the areas that would be covered by this bill has been such as to indicate frequently on the part of State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States. * * * (A)s the Chairman may recall * * * at the time of the initial school desegregation, * * * the legislature passed I don't know how many laws in the shortest period of time. Every time the judge issued a decree, the legislature * * * passed a law to frustrate that decree." *Allen* v. *State*

Board of Elections, 393 U.S. 544, 567-568 (1969) (quoting Katzenbach's House testimony).[1]

In 1970, Congress extended §5 for an additional five years, and in 1975 for seven more. 42 U.S.C. §1973*b*(a) (1970); 42 U.S.C. §1973*b*(a) (1976). 1975 also marked the last time the §4(b) coverage formula was updated. 42 U.S.C. §1973*b*(b) (1976).[2] Meanwhile, the Court had taken an expansive view of §5, finding it applied to all manner of state and local changes that could have even an arguable effect on voting. *Allen*, 393 U.S., at 566-567. In 1978, the Court confirmed that §5 also applies broadly to require any political subunit within a covered jurisdiction to submit changes for preclearance, despite a more restrictive definition of "political subdivision" elsewhere in the Act. *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 118 (1978).

In 1982, Congress reenacted §5 again, this time with a 25-year lifespan. 42 U.S.C. §1973*b*(a)(8)

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[1] Katzenbach's testimony demonstrates the district court's error in asserting that "the [1965] record contained no evidence that *all* covered jurisdictions had engaged in such behavior." J.S.App.129.

[2] In 1976, Justice Marshall noted that "[o]riginally, the Act was intended to be in effect for only five years. While it has been twice extended, each extension was also for only a few years; five more years in 1970, and seven more years in 1975," and "[t]he Act's limited term is proof that Congress intended to secure prompt, and not gradual, relief." *Beer* v. *United States*, 425 U.S. 130, 152 (1976) (Marshall, J., dissenting).

(1988). Congress also amended §4(a), the "bailout" provision, intending to provide political subdivisions within covered States a mechanism for removing themselves from §5 coverage and a corresponding incentive to make constructive efforts to improve voter accessibility within their jurisdictions. 42 U.S.C. §1973*b*(b) (1988). To bail out, political subdivisions needed to demonstrate ten years' compliance with the VRA and meet other substantive requirements. *Ibid.* Congress initially expected a large number, perhaps the majority, of covered jurisdictions to be eligible for bailout, but the anticipated flood of bailout litigation never materialized. See S. Rep. No. 97-417, at 59 (1982); H.R. Rep. No. 97-227, at 39 (1981); Williamson, The 1982 Amendments to the Voting Rights Act, 62 Wash. U. L.Q. 1, 30-33 (1984). Since 1982, only fifteen jurisdictions have successfully bailed out, all of them in Virginia. Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.php#note1.

As the 1982 extension of §5 was about to expire, Congress began gathering evidence regarding the need to further extend §5. Volumes of testimony and documentary evidence were amassed, but virtually all of it focused on attempts to demonstrate that racial discrimination as a general matter has not been completely eradicated.[3] Congress paid little, if any,

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[3] *E.g.*, H.R. Rep. No. 109-478, at 34 (2006) (labeling polarized voting as "the clearest and strongest evidence" of continued discrimination); 2 Fannie Lou Hamer, Rosa Parks, and Coretta

attention to the actual concern motivating §5—the practice prevalent before 1965 of certain jurisdictions purposefully evading judicial enforcement of constitutional guarantees. Several witnesses attempted to direct Congress's attention to the constitutional problems with reenacting §5—especially a §5 that otherwise remains substantively unchanged from the 1965 original—on the contemporary record.[4] Congress was informed that, at the very least, updates to the coverage formula or amendments to the bailout provision were needed to render §5 a congruent and proportional response to contemporary problems.[5]

Scott King Voting Rights Act Reauthorization and Amendments Act of 2006: Hearing on H.R. 9 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 109th Cong. 47-49 (2006) [hereinafter May 4 Hearing] (statement of Karen Narasaki); 1 Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 109th Cong. 18 (2006) [hereinafter Evidence of Continued Need] (statement of Bill Lann Lee); *id.*, at 26-28 (statement of Nadine Strossen).

[4] *E.g.*, May 4 Hearing, at 20-22, 24-25 (statement of Roger Clegg); Understanding the Benefits and Costs of Section 5 Preclearance: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 125-129, 134-136 (2006) [hereinafter Benefits and Costs] (responses of Nathaniel Persily).

[5] *E.g.*, Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 109th Cong. 91-92 (2005) (statement of Gerald Hebert); 152 Cong. Rec. S7980-7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn); 152 Cong. Rec. H5180 (daily ed. July 13, 2006) (statement of Rep. Norwood).

Congress, nevertheless, reenacted §5 essentially unchanged in 2006, extending it for another 25 years. 42 U.S.C. §1973*b*(a)(8). The 2006 enactment will not expire until 2031, 66 years after §5 was originally enacted as a five-year emergency measure. Congress did not update the coverage formula at all, and it still relies on data from 1972 and earlier. 42 U.S.C. §1973*b*(b). Congress also left the bailout provision unchanged from the 1982 version. 42 U.S.C. §1973*b*(a).

2. Northwest Austin Municipal Utility District Number One

The district is a municipal utility district created under Texas law around 1987 to perform certain governmental functions, including bond issuance for infrastructure construction and tax assessment to service bond indebtedness, for a neighborhood built on previously undeveloped land. See Tex. Water Code §54.239; SJEx.2. It is located within the City of Austin and Travis County, but it is independent of both and subject only to the State's supervision. See Tex. Water Code §54.239.

The district is governed by a board of five directors, who are elected to staggered four-year terms in biannual nonpartisan elections. Voters choose two or three candidates, depending on the number of director positions up for election, and the candidates with the highest vote totals are elected. See, *e.g.*, SJExs.6, 7, 9, 37.

Under Texas law, the district does not register voters but is responsible for its elections. Before 2004, the district's elections were held at private residences. Those polling places were precleared and never the subject of discrimination-related complaints, but the board eventually desired to hold elections at a more convenient public location, like the neighborhood school. See SJEx.12, at 33; SJEx.28, at 63; SJEx.35, at 50. While inquiring about holding elections at the school, the district learned that it could contractually delegate the conduct of its elections to Travis County and put district elections on the countywide ballot. SJEx.28, at 57-59, 65-66.

That arrangement would also benefit voters by allowing them to go to a single, convenient, public location to vote in all local elections at the same time and by permitting the district to utilize Travis County's election apparatus, including minority and language-minority election officials and precinct workers and extensive early-voting opportunities. SJEx.28, at 57-59, 65-66; J.A.90-92. With preclearance, the district has contracted with Travis County to conduct its elections since 2004. SJEx.9.

The district has always complied with §5's requirements, seeking and getting preclearance from the Attorney General when it changed election practices and procedures. SJExs.2-9. The Attorney General has never interposed an objection to any of the district's preclearance submissions. J.A.390. No election-related lawsuit has ever been filed against the district. *Ibid.* No one has complained about or

questioned any voting or election procedure used by the district. The intervenors in this case uniformly testified that they could not identify any problem with or complaint about the district's elections. See J.A.73-76, 118-121, 126-129, 139-141, 150, 165-166, 179-185, 199-200, 212-214, 224-226, 234-236, 245-246, 248-249, 322, 336, 349, 352, 367-368, 381.

3. The District Seeks Bailout or a Declaration Regarding §5's Constitutionality.

On August 4, 2006, the district filed suit seeking a declaration that the district had met the bailout requirements of §4 of the VRA or, in the alternative, that the reenactment of §5 was an unconstitutional exercise of congressional authority. The district moved for summary judgment, submitting ample evidence that it meets the substantive criteria for bailout required under 42 U.S.C. §1973*b*(a)(1). *E.g.*, J.A.388-391. Cross-motions for summary judgment were filed by the Attorney General and by several organizations and individuals who had been permitted to intervene despite their inability to identify any grievance beyond a philosophical objection to the district's suit.

In a May 30, 2008 opinion, the three-judge panel denied the district's motion for summary judgment and granted those of the Attorney General and defendant-intervenors. J.S.App.1-154. The court did not reach the question whether the district satisfied the bailout criteria, having held that the district was not a political subdivision eligible for bailout. It further

held, as its primary holding on §5's constitutionality, that the proper standard for reviewing legislation enforcing the Fifteenth Amendment was the purportedly rational-basis review articulated in *Katzenbach* and that the preclearance requirement of §5 met that standard. The court held, alternatively, that even reviewed under the purportedly different congruence-and-proportionality test of *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the preclearance mechanism was constitutional. J.S.App.1-154. The district timely appealed, and the Court noted probable jurisdiction.

SUMMARY OF THE ARGUMENT

The VRA's bailout mechanism was intended to incentivize jurisdictions, especially at the local level, to improve voting accessibility and to narrow the scope of §5's geographic coverage to any remaining pockets of recalcitrance. The statute is supposed to effectuate that purpose by making bailout available to "political subdivisions" within covered States. Although the VRA contains a restrictive definition of "political subdivision" that excludes most subunits smaller than counties, the Court has held that this restrictive definition applies only for the purpose of identifying entities that may be subject to separate coverage under §4(b) and does not define "political subdivision" elsewhere in the Act. Fragments of legislative history, which are countered by assertions that bailout is intended to be available to any covered jurisdiction, cannot abrogate the Court's statutory interpretation.

The district is a political subdivision within the ordinary meaning of the term and under Texas state law. Interpreting the §4(a) bailout provision to permit the district access to bailout is necessary to fulfill bailout's purpose and mitigate constitutional problems with §5. The district court's interpretation makes bailout a virtual nullity in all but a very few covered jurisdictions, apparently all in Virginia. Moreover, that interpretation reorders state government by putting counties in control of entities not subject to their authority under state law. If bailout is unachievable, it cannot reduce §5's overbroad geographic coverage.

In any event, the 2006 enactment of §5 must be subjected to a meaningful evaluation to determine whether its extraordinary prophylactic remedy is a constitutionally valid exercise of Congress's enforcement power under the Reconstruction Amendments. The enforcement clauses of the Fourteenth and Fifteenth Amendments are substantively identical. The Court has never suggested that the standard for evaluating Congress's exercise of the enforcement power under either clause is different and less stringent.

Section 5 sweeps far beyond purposeful discrimination, unnecessarily requiring federal vetting of vast numbers of constitutionally benign state and local changes. That unparalleled federal veto was originally enacted to address a specific, acute problem—the gamesmanship by which recalcitrant States and localities formerly attempted to stay one step ahead

of federal decrees. The preemptive §5 can only be justified as a response to such a problem; purposeful discrimination that has ripened into a constitutional violation is adequately addressed by direct prohibitions like §2. Absent evidence that case-by-case adjudication remains an unviable method of enforcing constitutional guarantees, §5 cannot be employed simply because a blunt instrument is easier to wield than a litigation scalpel.

The record Congress amassed in 2006 does not demonstrate that covered jurisdictions continue to attempt to evade enforcement. Such voting discrimination as remains is isolated in time and place, neither confined to nor prevalent in covered jurisdictions, and can be remedied in the courts. The evidence on which Congress and the district court relied fails to establish that conditions in covered jurisdictions are anything like those to which §5 might be tailored. The record instead demonstrates the progress that has been made in overcoming voting discrimination in America over the past four decades.

In addition to being the most serious compromise of our federalist structure on the statute books, §5 exceeds the bounds of any tailored remedy in several other ways. Especially given Congress's failure to update the coverage formula last amended in 1975, §5's geographic boundaries bear no rational relationship to the locus of any problems that may persist. Nor does Congress recognize any meaningful time limit on §5, as it appears to believe it may extend the

once five-year provision into perpetuity on ever more stale evidence. Finally, §5 remains expansive in subject matter, not confining itself to such issues as redistricting but continuing to apply to the most minute and obviously benign changes like moving a polling place from a private garage to a public school.

ARGUMENT

I. THE BAILOUT PROVISION SHOULD BE INTERPRETED TO PERMIT THE DISTRICT TO MAKE USE OF IT.

A. Bailout Was Intended to Be a Functional Mechanism That Incentivized Compliance and Limited §5's Coverage to Problem Areas.

The original VRA's bailout provision, essentially, provided a way for States or separately covered political subdivisions to demonstrate, before the original §5 lapsed in five years, that they had been covered by mistake. Under the coverage formula in §4(b), only jurisdictions that "maintained on November 1, 1964, any test or device," as defined in the Act, were intended to be covered. 42 U.S.C. §1973*b*(b) (Supp. 4 v.2 1965-1969). Under the original §4(a), a jurisdiction could bail out if it could show that it had not, in fact, done so for at least five years. 42 U.S.C. §1973*b*(a) (Supp. 4 v.2 1965-1969). "[T]he original bailout mechanism made no provision for local political subdivisions within a state covered in its entirety

to seek termination of coverage independently of the state," which "may have had the effect of providing little incentive for compliance at the local level." Williamson, *supra*, at 30. That lack of incentive for local jurisdictions to improve, which contributed to freezing potentially discriminatory systems in place, was regarded as a significant weakness of the VRA. See *id.*, at 31.

When, in 1982, Congress extended §5 for the third time, this time for 25 years, it intended the new bailout mechanism to provide an incentive for covered regions to improve from the local level up. See *id.*, at 32. Congress plainly expected that a large number of subdivisions would be almost immediately able to show ten years' worth of compliance and constructive effort, making them eligible to escape §5 coverage, and, accordingly, delayed the effective date of the new bailout mechanism until 1984 so the Department of Justice could brace for the expected onslaught. *Id.*, at 33; see S. Rep. No. 97-417, at 59; H.R. Rep. No. 97-227, at 39.

B. The Statutory Text Accords with Congress's Purpose, Making Bailout Available to "Political Subdivisions" in Covered States.

Section 4(a) says clearly that "any political subdivision of" any covered State can seek a bailout

declaration. 42 U.S.C. §1973*b*(a)(1) (2006).[6] The district is in a covered State. See Voting Rights Act Amendments of 1975: Partial List of Determinations, 40 Fed. Reg. 43750 (1975).

A subunit like a utility district unquestionably falls within the ordinary meaning of "political subdivision." See, *e.g.*, Black's Law Dictionary 1159 (6th ed. 1991); accord, *e.g.*, *Branson Sch. Dist. RE-82* v. *Romer*, 161 F.3d 619, 628 (CA10 1998) (a school district was a "political subdivision"). And the district is considered a political subdivision under Texas law. See Tex. Const., Art. XVI, §59(a), (b); Tex. Water Code §54.011; *Bennett* v. *Brown County Water Improvement Dist. No. 1*, 272 S.W.2d 498, 500 (Tex. 1954); cf. *Dougherty County, Ga. Board of Educ.* v. *White*, 439 U.S. 32, 43 & n.13 (1978) (school board

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[6] More fully, §4(a) provides:

"no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section." 42 U.S.C. §1973*b*(a)(1) (2006).

was "a political subdivision under state law"). Indeed, the Texas Election Code expressly denotes governmental units that hold elections as "political subdivision[s]" of the State. *E.g.*, Tex. Elec. Code §41.005. Accordingly, the 1988 preclearance submission relating to the district's creation identified "[t]he change affecting voting" as "a result of the creation of the District as a political subdivision of the State of Texas." SJEx.3.

The Court "give[s] the words of a statute their '"ordinary, contemporary, common meaning,"' absent an indication Congress intended them to bear some different import." *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000); cf. *Lopez* v. *Monterey County*, 525 U.S. 266, 278-279 (1999) (turning to dictionary definitions to interpret "administer" in §5). The statutory text contains no indication that Congress intended "political subdivision" to bear anything other than its ordinary meaning in §4(a) because the only possible statutory source for a definition of "political subdivision" that would exclude subunits like the district—the definition of "political subdivision" in §14(c)(2)—was confined by this Court to a different context before the current version of §4(a) was enacted.

Section 14(c)(2) of the Act provides that "[t]he term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. §1973*l*(c)(2). The Court, however, has twice

held that §14(c)(2) does not make "political subdivision" a defined term throughout the VRA and, rather, §14(c)(2) is relevant only to identifying those subdivisions that can be subject to coverage determinations separately from their States. Determining the reach of §14(c)(2), *Sheffield* explained that "Congress' *exclusive* objective in §14(c)(2) was to limit the jurisdictions which may be separately designated for coverage under §4(b)." 435 U.S., at 131, n.18 (emphasis added).

Accordingly, §14(c)(2) limits "political subdivision" only as the term is used in §4(b), the coverage formula, 42 U.S.C. §1973*b*(b), and not as used in §5 or in §4(a), which contains the bailout provision. *Sheffield*, 435 U.S., at 120-122 (stating that "§4(a) imposes a duty on *every entity* in the covered jurisdictions having power over the electoral process, *whether or not the entity registers voters*" and rejecting the "conclusion that §5 should apply only to counties and to the political units that conduct voter registration" (emphasis added)); see also *United States* v. *Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 554-555 (CA5 1980) ("[T]he Supreme Court has held that [§14(c)(2)'s] definition limits the meaning of the phrase 'State or political subdivision' only when it appears in certain parts of the Act, and that it does not confine the phrase as used elsewhere in the Act."). *Dougherty County* confirms the effect of *Sheffield*'s rationale on the application of §14(c)(2). *Dougherty County* recognized that "Section 5 applies to all changes affecting voting made by 'political

subdivision[s]' of States designated for coverage pursuant to §4 of the Act," 439 U.S., at 43 (alteration in original), and held that *Sheffield* "squarely foreclosed" a school board's contention that it was not a political subdivision because §14(c)(2) applied and because the board did not register voters. *Id.*, at 44. Although the school board did not register voters—indeed, did not even conduct elections—it was a political subdivision under the Act for purposes outside the coverage limitation imposed by §14(c)(2). *Ibid.*

Sheffield's limitation of §14(c)(2)'s application was necessary if the Act was to have Congress's intended effect of eradicating devices limiting access to voting at whatever governmental level they may be employed. See *Sheffield*, 435 U.S., at 120-121 (noting that "[t]he congressional objectives plainly required that §4(a) apply throughout each designated jurisdiction" and that "[i]f it did not have this scope, the covered States . . . could have easily circumvented §4(a) by, *e.g.*, discontinuing the use of literacy tests to determine who may register but requiring that all citizens pass literacy tests at the polling places before voting"); *id.*, at 122 ("The terms of the Act and decisions of this Court clearly indicate that §5 was not intended to apply only to voting changes occurring within the registration process."). Indeed, because "political subdivision" is used to denote the scope of numerous provisions, were the §14(c)(2) definition not cabined to the context of coverage determinations, much of the VRA's substantive protection would be

eviscerated. "The usage 'in a political subdivision,' which occurs in §4(a) and in many other sections of the Act, see, *e.g.*, 42 U.S.C. §§1973*a*(a)-(c) (1970 ed., Supp. V), would be nonsensical if 'political subdivision' denoted only specific functional units of state government." *Sheffield*, 435 U.S., at 128, n.15. The Court recognized that applying §14(c)(2)'s definition too broadly would have permitted States to circumvent many of the Act's protections. See *id.*, at 121-122. And applying the definition throughout would distort the VRA in other ways.

It would make no sense to treat the district as a "political subdivision" that can seek judicial preclearance, 42 U.S.C. §1973*c*(a), or to which the Attorney General may assign observers or that may petition for observers' removal, *id.*, §§1973*a*, 1973*f*(a)(1)-(2), 1973*k*(c), but not treat it as a "political subdivision" for bailout purposes. "Political subdivision" is used to denote relevant governmental subunits in numerous provisions, to identify, for example, entities that are bound by §2's substantive prohibition of discrimination, *id.*, §1973, are prohibited from using discriminatory voting requirements or prerequisites and tests or devices, *id.*, §§1973(a), 1973*b*(a)(1), are prohibited from using voting qualifications or prerequisites to deny language minorities the right to vote, *id.*, §1973*b*(f)(2), and are required to provide non-English election information, *id.*, §1973*b*(f)(4).

When it added "any political subdivision of [a covered] State . . . , though such determinations were not made with respect to such subdivision as a

separate unit" to the list of jurisdictions that could pursue bailout, 42 U.S.C. §1973*b*(a)(1), Congress made no change to §§4(a) or 14(c)(2) to incorporate §14(c)(2)'s restrictive definition of "political subdivision" into §4(a). The post-comma phrase "though such determinations were not made with respect to such subdivision as a separate unit" is simply clarifying language, responsive to *City of Rome* v. *United States*, 446 U.S. 156 (1980), in which the Court recognized that the earlier bailout provision made bailout unavailable to any political subdivisions that were not separately covered. *Id.*, at 167-168. Instead of invoking coverage eligibility, Congress stated simply that bailout is available to all political subdivisions in a covered State regardless whether they were separately covered. The phrase in no way limits the term "any political subdivision" to only subdivisions that could be separately covered. Had Congress, despite its intent to expand bailout, wanted to apply §14(c)(2) to the bailout context, it could easily have expressly limited bailout to subdivisions to which a coverage determination could have been made.

The district court also relied on legislative history, in particular statements in the 1982 House and Senate reports. Those statements do suggest what the enacted statutory text does not—that the revised §4(a) would incorporate §14(c)(2), limiting bailout to counties, parishes, or other units that register voters. See H.R. Rep. No. 97-227, at 2; S. Rep. No. 97-414, at 2, 57, n.192, 69. But such statements are insufficient to override the statutory text, which

must be interpreted in light of the Court's earlier cabining of the §14(c)(2) definition to the coverage context. See, *e.g.*, *Reno* v. *Bossier Parish Sch. Board*, 520 U.S. 471, 483-484 (1997) ("Congress has made it sufficiently clear that a violation of §2 is not grounds in and of itself for denying preclearance under §5. That there may be some suggestion to the contrary in the Senate Report to the 1982 Voting Rights Act amendments . . . does not change our view."); *Georgia* v. *United States*, 411 U.S. 526, 533 (1973) (concluding that Congress's failure to make substantive changes to §5 indicated Congress's agreement with the Court's broad interpretation of that section).

Congress is presumed to take cognizance of the Court's prior interpretations of statutes. See *Williams*, 529 U.S., at 434; *N.L.R.B.* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981). Congress may abrogate those interpretations only by amending statutes. See *Bossier Parish*, 520 U.S., at 484 ("We doubt that Congress would depart from the settled interpretation of §5 and impose a demonstrably greater burden on the jurisdictions covered by §5 . . . by dropping a footnote in a Senate Report instead of amending the statute itself."). In any event, the isolated statements suggesting that bailout would be limited to counties conflict with numerous clear statements indicating bailout was intended to be a workable, frequently used procedure available to "*any* covered jurisdiction." H.R. Rep. No. 109-478, at 93 (emphasis added); see also, *e.g.*, *id.*, at 25, 58, 61; S. Rep. No. 97-417, at 48, 53, n.182, 59; H.R. Rep. No. 97-227, at 39.

C. Interpreting §4(a) to Include All Political Subdivisions in Covered States Mitigates §5's Constitutional Infirmity.

In addition to being required by the statutory text as informed by the Court's precedent, an interpretation of §4(a) making bailout available to all political subunits in covered States is required to mitigate the constitutional problems posed by §5. As discussed further below, the 2006 enactment of §5 is not a congruent and proportional exercise of Congress's enforcement power under the Reconstruction Amendments, in part because the coverage formula relies on decades-old data that cannot rationally identify contemporary offenders. The Court upheld the original §5 in part because "the remedy was directed only to those States in which Congress found that there had been discrimination." *United States* v. *Morrison*, 529 U.S. 598, 626-627 (2000). The same cannot be said of the 2006 enactment of §5. A workable bailout process is the only possible way of removing compliant jurisdictions from §5's overbroad coverage.

"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Att'y Gen.* v. *Del. & Hudson Co.*, 213 U.S. 366, 408 (1909); cf. *Miller* v. *Johnson*, 515 U.S. 900, 926-927 (1995) (finding it unnecessary to reach serious constitutional questions posed by an Attorney General interpretation of §5 when the VRA

should not be interpreted in the manner urged by the Attorney General). The most natural interpretation of §4(a)—especially given the Court's limiting interpretation of §14(c)(2)—makes the bailout mechanism available to all political subdivisions within covered States. That interpretation of §4(a) is also the only interpretation that minimizes constitutional concerns.

By contrast, it makes no constitutional sense to interpret §4(a) restrictively for bailout purposes only, making bailout unachievable for the vast majority of covered jurisdictions. To bail out, a covered jurisdiction must establish that itself and any entities within its territory meet detailed substantive criteria, like ten years' worth of compliance with §5—including timely submission of voting-related changes for preclearance—coupled with constructive efforts to improve electoral access within the same time period. 42 U.S.C. §1973*b*(a)(1)(D). In most covered States, including Texas, restricting bailout to the county level makes the bailout procedure practically unworkable. For example, the territory of Travis County, in which the district is located, includes at least 107 geographically smaller governmental units. J.A.87-88.

Under the district court's interpretation, however, the only way bailout could ever be achieved is if Travis County researched activities of each of those entities for the prior ten years. That monumental task would be further complicated because in most States, including Texas, counties have no authority to compel entities like utility districts to comply with

preclearance or even to share information with the county about past compliance. See Tex. Water Code Ch. 54; SJEx.14, at 23. As a result, it would be practically impossible for most counties to establish that every internal subunit meets the statutory conditions for bailout, see Williamson, *supra*, at 42[7]—the Hotel California problem.[8]

Unlike most States, Virginia structures its local government so that counties and independent cities do not contain large numbers of smaller governmental units. See Va. Code §15.2-1500(A). That idiosyncrasy explains why, of thousands of subdivisions covered by §5, only 15 have successfully bailed out since 1982, all of them counties or independent cities in Virginia. Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.php#note1. One of the very few counties outside Virginia that has even attempted to bail out, Kings County, California, abandoned the effort after difficulties arose because some entities within its territory no longer even existed and because the county had no authority to compel §5 compliance by existing entities. Hebert, An Assessment of the Bailout Provisions of the Voting Rights Act, in Voting Rights Act Reauthorization of

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[7] Although Professor Williamson appears to have fallen into the trap of reading the §14(c)(2) definition into §4(a), his analysis of the problems such an interpretation generates remains sound.

[8] The Eagles, Hotel California (Asylum Records 1976) ("You can check out any time you like, but you can never leave.").

2006, at 273 & n.62 (Henderson ed., 2007). Section 4(a) should be interpreted to comport with the intent to make bailout not a Virginia-only remedy but a procedure "within the reach" of *all* compliant covered jurisdictions. H.R. Rep. No. 109-478, at 58.

Moreover, under the district court's interpretation, §4(a) interferes with and reorders state government in States like Texas by granting counties political control over jurisdictions that are not under their authority according to state law. The district, for example, was created under the Texas Constitution, see Tex. Const., Art. XVI, §59(a), (b), and operates exclusively under the supervision of the State, not Travis County. See Tex. Water Code §§54.012, 54.013(a), 54.0161, 54.5161. But under the district court's interpretation of §4(a), the VRA interposes Travis County between the district and the State of Texas by granting Travis County the discretion to determine when the district may terminate its preclearance obligations. Such an extraordinary invasion of the States' sovereign authority to organize their own governments only exacerbates the congruence and proportionality problems already presented by §5. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.").

II. THE 2006 ENACTMENT OF §5 EXCEEDED CONGRESS'S ENFORCEMENT POWERS.

Section 5 was originally enacted and justified as an emergency response to a very specific constitutional dilemma—the recalcitrance of a generation of officials that made case-by-case enforcement of voting rights impossible. That emergency no longer exists, and there is no indication it will recur. The voting-rights problems Congress identified in the 2006 record do not justify §5 and, rather, are quickly and fully remedied by §2 and other substantive prohibitions. Contemporary defiance of the type that justified §5 is rare, if it exists at all, and cannot justify renewing §5 for yet another generation. Congress's refusal to revisit the coverage formula and instead continue to rely on circumstances that existed between 1964 and 1972 shows its complete failure to conduct any meaningful comparative evaluation.

A. The Court Has Articulated a Consistent Standard for Whether Prophylactic Remedies Validly Enforce the Reconstruction Amendments.

The district court, in its primary rationale for rejecting the district's constitutional challenge, misread this Court's precedent as applying a different, less exacting standard for reviewing Congress's exercise of its Fifteenth Amendment enforcement power than to exercises of its Fourteenth Amendment enforcement power. Contrary to the district court's premise, this Court recognizes that the enforcement

clauses of the Fourteenth and Fifteenth Amendments are "virtually identical." *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 373, n.8 (2001). Accordingly, *Boerne* drew explicitly on *Katzenbach*'s analysis of Congress's remedial powers under §2 of the Fifteenth Amendment in addressing the substantively identical §5 of the Fourteenth Amendment. *Boerne*, 521 U.S., at 519-520, 525-527. Nor do *Boerne* or its progeny purport to apply a standard differing from that applied in *Katzenbach* or, even earlier, in the *Civil Rights Cases*, 109 U.S. 3 (1883).

1. The Court's Standard Evaluates Whether Measures Properly Enforce Substantive Guarantees.

The authority conferred on Congress by each of the Reconstruction Amendments is limited to the power to "enforce" their substantive guarantees through "appropriate legislation." U.S. Const., Amdts. 13, §2; 14, §5; 15, §2; see *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437-439 (1968) (discussing Thirteenth Amendment enforcement power). "[T]he same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power." *Kimel* v. *Fla. Board of Regents*, 528 U.S. 62, 81 (2000). The power to enforce, in the sense of the constitutional text, is the power to compel observance of or obedience to the rights secured by the amendments. See *Griffin* v. *Breckenridge*, 403 U.S. 88, 105

(1971); *Civil Rights Cases*, 109 U.S., at 11-14; see also American Heritage Dictionary 592 (4th ed. 2006).[9]

Congress's enforcement of individual rights typically takes the form of either direct proscription or a mechanism by which the right-holder can bring suit. *E.g.*, 42 U.S.C. §2000*e*-2(a) (proscribing certain discriminatory practices by government employers); *id.*, §2000*e*-5(f) (providing cause of action to enforce right to equal protection through suit against government employer). When Congress goes beyond proscribing constitutional violations—as with §5 of the VRA—the Court has demanded that Congress demonstrate that direct proscription is insufficient to effectively safeguard substantive rights. "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a *somewhat* broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S., at 81 (emphasis added). It does not include the authority to regulate a grossly broader swath of constitutionally benign conduct with little demonstrated correlation to actual constitutional violations.

"As broad as the congressional enforcement power is, it is not unlimited." *Oregon* v. *Mitchell*, 400

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[9] Accord N. Webster, American Dictionary of the English Language 396 (1860) ("To put in execution; to cause to take effect; as, to enforce the laws"); J. Worcester, Dictionary of the English Language 484 (1860) ("To put in force; to cause to be applied or executed; as, 'To enforce a law' ").

U.S. 112, 128 (1970) (Black, J.). "Legislation which alters the meaning of" a constitutional clause "cannot be said to be enforcing the Clause," *Boerne*, 521 U.S., at 519, and neither can legislation that alters the enduring structural principles that undergird the division between federal and state power. "[T]he power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation." *Mitchell*, 400 U.S., at 128 (Black, J.). Prophylactic legislation enacted to enforce the substantive guarantees of the Reconstruction Amendments must be clearly related to remedying violations of those guarantees. And the more a prophylactic measure intrudes on the scope of other constitutional provisions and principles, the more critical it is that the measure fit as closely as possible to a valid remedial objective.

In several cases, the Court has explained that when Congress enacts prophylactic legislation under the Reconstruction Amendments it must "identify conduct transgressing the . . . substantive provisions" it seeks to enforce and "tailor its legislative scheme to remedying or preventing such conduct." *Fla. Prepaid Postsecondary Educ. Expense Board* v. *Coll. Sav. Bank*, 527 U.S. 627, 639 (1999). Congress must compile a legislative record that demonstrates a "history and pattern" of constitutional violations of the right Congress purports to enforce. *Garrett*, 531

U.S., at 368; accord *Nev. Dept. of Human Res.* v. *Hibbs*, 538 U.S. 721, 729 (2003). And Congress must confront evidence of a pattern of *purposeful* discrimination to demonstrate constitutional violations under either the Fourteenth or Fifteenth Amendment. See *Shaw* v. *Reno*, 509 U.S. 630, 641 (1993); *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion). The legislative measures selected must not be "so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S., at 532. As the Court has repeatedly said, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520.

When evaluating an enactment under the Reconstruction Amendments' enforcement power, a reviewing court must identify the "metes and bounds of the constitutional right in question," *Garrett*, 531 U.S., at 368, with "some precision," *id.*, at 365. Then the court asks "whether Congress identified a history and pattern," *id.*, at 368, of "widespread and persisting deprivation[s]" of the relevant right, *Boerne*, 521 U.S., at 526. Finally, the court determines whether the statutory remedy is congruent and proportional to the constitutional right Congress is purporting to enforce. *Garrett*, 531 U.S., at 372.

2. *Katzenbach*, *Boerne*, and Other Cases Articulate a Consistent Standard That Applies to §5.

Contrary to the district court's premise, in evaluating the original enactment of §5, *Katzenbach* acknowledged and respected the same limitations on Congress's enforcement authority recognized in later cases, including *Boerne* and its progeny. Consistently, the Court has inquired whether Congress amassed a legislative record substantiating the existence, scope, and contours of the problem it sought to address in order to justify prophylactic legislation. See *Katzenbach*, 383 U.S., at 308 ("Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting."); accord *Garrett*, 531 U.S., at 368 (examining "whether Congress identified a history and pattern of unconstitutional [conduct]"); *Jones*, 392 U.S., at 426-430 (surveying and evaluating the legislative record justifying the 1866 enactment of 42 U.S.C. §1982 as a measure intended to enforce the Thirteenth Amendment by eliminating badges and incidents of slavery, including evidence justifying applying §1982 nationwide).

As the Court made plain in *Boerne*, a single standard of review has been uniformly applied in a line of cases evaluating prophylactic enforcement legislation that stretches unbroken from the *Civil Rights Cases*. *Boerne*, 521 U.S., at 524-527 (noting that "[a]lthough the specific holdings of these early cases might have been superseded or modified, their treatment of Congress' §5 power as corrective or

preventive, not definitional, has not been questioned" (internal citations omitted)). *Boerne* treats *Katzenbach* itself as paradigmatic. *Id.*, at 525-526. *Boerne* and cases following it do no more than elaborate and clarify the standard for reviewing Congress's efforts to enforce the Reconstruction Amendments that has for more than a century served to ensure Congress does not work substantive alterations in the constitutional fabric.

The Court in *Katzenbach* well understood that in light of the extraordinary authority assumed in §5 to preemptively veto state laws, the "constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects." 383 U.S., at 308. *Katzenbach* further acknowledged that the type of evidence needed to justify preclearance differs in kind from that which justifies substantive prohibitions like §2. Section 5, *Katzenbach* recognized, was supported specifically by evidence of the "exceptional conditions" present in 1965 that could "justify legislative measures *not otherwise appropriate*." *Id.*, at 334 (emphasis added); accord *Miller*, 515 U.S., at 926-927. Section 5 thus could not be "appropriate legislation," U.S. Const., Amdt. 15, §2, to enforce the Fifteenth Amendment without evidence of a clear symmetry between an existing problem and that extraordinary remedy. See *Katzenbach*, 383 U.S., at 335 ("Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner."); see also *Boerne*, 521 U.S., at 530 ("The appropriateness of remedial

measures must be considered in light of the evil presented."); cf. Bickel, The Voting Rights Cases, 1966 Sup. Ct. Rev. 79, 97 ("[T]he power of Congress comes into play only when the precondition of a denial of equal protection of the laws by a state has been met. Congress' view that the precondition has been met should be persuasive, but it cannot be decisive.").

Katzenbach further acknowledged that prophylactic legislation that purports to enforce the Fifteenth Amendment's provisions but in fact extends far beyond the scope of predicate constitutional violations would be invalidated. "[W]hen the Court has found an unconstitutional exercise of these powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment." *Katzenbach*, 383 U.S., at 326; see *Boerne*, 521 U.S., at 527 ("Any suggestion that Congress has a substantive, nonremedial power under the Fourteenth Amendment is not supported by our case law."). *Katzenbach* itself thus refutes the district court's mistaken suggestion that "the basic concerns animating the *Boerne* cases do not apply to legislation designed to prevent racial discrimination in voting." J.S.App.47.

Additionally, *Rome*'s upholding of the 1975 reenactment of §5 is equally consistent with *Katzenbach* and later cases. Although §5 may have quelled the immediate emergency when first enacted, there was no question the emergency prevailed as late as 1965, and the Court found "unsurprising and unassailable" the conclusion that ten years had not been long

enough to ensure that recalcitrant jurisdictions would not revert to their former ways and that another seven years of §5 was warranted. *Rome*, 446 U.S., at 182. But four decades is time enough for generations of officials to pass from power, for individuals to migrate into and out of covered jurisdictions, for others to be born and come of voting age, and for attitudes and mores to change. *Rome* nowhere suggests that Congress in 2006 or later could continue to rely on the 1965 emergency without a searching reevaluation of whether case-by-case adjudication remains insufficient to enforce substantive voting-rights guarantees. See *Boerne*, 521 U.S., at 533 (finding it significant that the renewal upheld in *Rome* lapsed in only seven years).

3. The Court Continues to Require a Demonstrated Fit Between Remedy and Substantive Right.

Neither *Hibbs* nor *Tennessee* v. *Lane*, 541 U.S. 509 (2004), relaxes the standard for evaluating Congress's attempts to exercise its enforcement power. Those cases simply reinforce the unsurprising point that, when Congress addresses matters involving a fundamental right or suspect class, constitutional violations by state actors are more likely to have occurred and a congressional record extensive enough to justify prophylactic legislation will generally be easier to amass. See *Hibbs*, 538 U.S., at 736; *Lane*, 541 U.S., at 524. And if predicate constitutional violations are more numerous, more widespread, and

more varied, a broader remedy may be constitutionally valid.

Hibbs and *Lane* do not change the constitutional text limiting Congress's power. Even when Congress addresses a fundamental right or suspect classification—as when it addresses racial discrimination in voting—Congress cannot base remedies on assumptions about predicate violations but must still amass a relevant record. See, *e.g.*, *Lane*, 541 U.S., at 528 (lauding the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services"). When more fundamental rights are at stake, the constitutional problem may be larger, but the process of comparing the scope and nexus of the prophylactic to the constitutional problem cannot be more lax. See *id.*, at 530-533; *Hibbs*, 538 U.S., at 737-740.

Hibbs and *Lane* demonstrate why evidence Congress adduced of recent occurrences of voting-related discrimination may justify the continued existence of substantive provisions like §2 of the VRA, but they do not abrogate Congress's need to justify the far different, broader, and extraordinary remedy of §5. The district court failed to comprehend this distinction, erroneously suggesting that any time Congress may enact substantive prohibitions under the amendments it may also inject the federal government into state and local legislative processes by, for example, creating a federal bureaucracy with veto authority over state and local architectural designs or

leave policies. But Congress cannot employ a mechanism like §5, which reaches far beyond the scope of predicate constitutional violations and impinges on other constitutional principles, when that mechanism is not carefully tailored to the temporal, geographic, and other contours of predicate violations of substantive rights enshrined in the Fourteenth and Fifteenth Amendments.

B. Section 5 Is Not a Valid Exercise of Congress's Enforcement Powers.

1. Section 5 Is Not Tailored to Remedy a Demonstrable Record of Contemporary "Ingenious Defiance" in Covered Jurisdictions.

Congress's stated purpose in the 2006 VRA is "to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §2, 120 Stat. 577. Section 1 of the Fifteenth Amendment states the constitutional guarantee: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const., Amdt. 15, §1. That guarantee has been described more specifically as a guarantee against "*purposefully* discriminatory denial or abridgment by government of the freedom to vote."

Mobile, 446 U.S., at 65 (plurality opinion) (emphasis added); accord *Myers* v. *Anderson*, 238 U.S. 368, 379 (1915); *Guinn* v. *United States*, 238 U.S. 347, 363-365 (1915). To the extent Congress also intended to enforce the Fourteenth Amendment's Equal Protection Clause, that guarantee has also been characterized as a guarantee against purposeful discrimination. See *Mobile*, 446 U.S., at 66 (plurality opinion).

Section 2 of the VRA, which mirrors §1 of the Fifteenth Amendment, and the Act's other permanent substantive provisions aim directly at the heart of the actual discrimination the Constitution forbids. See, *e.g.*, 42 U.S.C. §§1973, 1973*a*, 1973*h*, 1973*i*. Section 5 was created to address the distinct issue that conditions in certain jurisdictions as of 1965 made enforcement through §2 and other substantive provisions impossible. Accordingly, §5 goes far beyond directly addressing purposeful discrimination. The archetypal prophylactic, §5 preempts *every* change related to voting—however minute or benign—in covered jurisdictions and subjects them to federal review. *Allen*, 393 U.S., at 566-567.

Section 5 thus sweeps far past purposeful discrimination to ensnare and preempt a massive number of constitutionally benign state voting enactments and practices. In its 2006 incarnation, it no longer does so on a temporary, emergency basis, nor is its effect circumscribed to all or only those jurisdictions for which there was evidence of present-day discrimination. Cf. *Katzenbach*, 383 U.S., at 315 (noting that the 1965 enactment was aimed "at areas where

voting discrimination has been most flagrant" through the time of its passage). Section 5 accordingly poses precisely the risk addressed by *Boerne*, that in enacting prophylactic legislation to prevent and remedy purported violations, Congress would instead rewrite the substantive scope of the Reconstruction Amendments and impermissibly reweigh the balance of state and federal power. See *Boerne*, 521 U.S., at 519 ("Congress does not enforce a constitutional right by changing what the right is."); cf. Bickel, *supra*, at 101 (reliance in the voting rights cases on Justice Marshall's dictum in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421 (1819), "de-emphasized altogether too much Marshall's caveat that the means chosen must also not be prohibited, and must 'consist with the letter and spirit of the constitution'").

Section 5 ultimately rests on a presumption of bad faith, specifically a presumption that covered jurisdictions are inclined to enact purposefully discriminatory measures at a rate that could not be dealt with by ordinary litigation. As the Court has recognized, the original "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer* v. *United States*, 425 U.S. 130, 140 (1976). "Section 5 was directed at preventing a particular set of invidious practices that had the effect of 'undo[ing] or defeat[ing] the rights recently won by nonwhite voters.'" *Miller*, 515 U.S., at 925. "That is, the courts and Congress could ban

familiar disfranchising devices only to confront novel ones devised by southern states bent on evading the law." A. Thernstrom, Whose Votes Count?: Affirmative Action and Minority Voting Rights 21-22 (1987) (quoting NAACP executive director Roy Wilkins). When Congress originally created §5, it found specifically that (1) racial discrimination in voting was "an *insidious and pervasive evil* which had been perpetuated in certain parts of our country through *unremitting and ingenious defiance* of the Constitution," and (2) previous congressional measures had been "unsuccessful remedies." *Katzenbach*, 383 U.S., at 309 (emphasis added); see *Miller*, 515 U.S., at 925-926.

Section 5, in other words, cannot be justified simply on a record of discrimination in general. Instead, there must be a showing—as in *Katzenbach*—of a systematic pattern of covered jurisdictions recently engaging in concerted efforts to game the system to the disadvantage of minorities by acting preemptively to impose new barriers to voting once old barriers are judicially deemed unenforceable (or at least a meaningful demonstration that jurisdictions would have reverted to those practices had §5 not been reenacted). See *Miller*, 515 U.S., at 925; *Allen*, 393 U.S., at 567-568. Section 2 of the VRA, like other substantive prohibitions in federal law, is the remedy for ripened constitutional violations. Section 5 addresses a particular, different problem—the deliberate gamesmanship by which officials attempted to stay one step ahead of courts, making case-by-case adjudication of violations impossible.

See, *e.g.*, *Allen*, 393 U.S., at 567-568 (quoting Attorney General Katzenbach's testimony); Transcript of Oral Argument, at 47, *Riley* v. *Kennedy*, 128 S.Ct. 1970 (2008) (No. 07-77) (argument by Pamela S. Karlan) (comparing the §5 problem to a "game of Whac-A-Mole"). Circumstances in which case-by-case adjudication cannot keep up with a vicious circle of unconstitutional conduct present the only conceivably justifiable basis for inverting the traditional concept that constitutional violations are not ripe for prosecution until they have already occurred or are at least imminent. See *Beer*, 425 U.S., at 140.

To qualify as enforcement of substantive constitutional rights, the broad, prophylactic §5 would have to be tailored to "remedying or preventing such conduct." *Fla. Prepaid*, 527 U.S., at 639. Congress cannot be shown to have tailored its scheme without demonstrating the requisite "history and pattern," *Garrett*, 531 U.S., at 368; accord *Hibbs*, 538 U.S., at 729; *Fla. Prepaid*, 527 U.S., at 640, of gamesmanship by those jurisdictions targeted by the coverage formula. See *Lane*, 541 U.S., at 531 (upholding the validity of remedial legislation "as it applies to the class of cases" at issue); *Morrison*, 529 U.S., at 626 (invalidating VAWA's civil-remedy provision in part because it "applie[d] uniformly throughout the Nation," including to States with no history of discriminating against victims of gender-motivated violence); *Fla. Prepaid*, 527 U.S., at 647 (same with regard to the Patent Act and patent infringement). In other words, Congress needed to ask whether state and

local governments in covered jurisdictions remain generally so hellbent on depriving minorities of their voting rights that they presumptively cannot be trusted to enact fair voting practices and procedures without the federal Executive looking over their shoulder (and to answer that question in the affirmative). Congress did neither in reenacting §5.

Section 5 presents the most severe intrusion on state sovereignty in federal law, and the 2006 enactment cannot be upheld on the record adduced by Congress. The Court has made clear that the federalism costs exacted by §5 must be taken seriously and can only be justified by a real, specific problem. *Miller* explained that the Court's belief that "the federalism costs exacted by §5 preclearance could be justified by those extraordinary circumstances" identified in *Katzenbach* did not mean §5 could be justified in every circumstance. *Miller*, 515 U.S., at 926-927. Imposing such an extreme measure demands a clear demonstration that it remains a needed and justifiable emergency remedy, separate and distinct from the general justification for the VRA's core substantive provisions.

2. Section 5 Is Not Tailored to an Existing Pattern of Discrimination.

The 2006 legislative record does not demonstrate a pattern of actual or anticipated gamesmanship in covered jurisdictions that could justify the reenactment of §5. There is no evidence that conditions are

remotely similar to those justifying §5 in 1965 nor—importantly in assessing renewal of a four-decade-old remedy—that officials in covered jurisdictions would revert to the conduct of their forebears if §5 were allowed to expire. Cf. *Riley*, 128 S.Ct., at 1987 (Stevens, J., dissenting) ("Even though many of those changes are, at least in part, the consequence of vigorous and sustained enforcement of the VRA, it may well be true that today the statute is maintaining strict federal controls that are not as necessary or appropriate as they once were."). Instead, the record establishes that voting discrimination, both private and state action, persists in haphazard and uncoordinated instances in covered and uncovered jurisdictions alike that do not justify federal oversight designed to thwart repetitive and systematic avoidance of judicial decrees concerning voting rights.

Though the record is voluminous, the district court identified only three examples of efforts to actively evade enforcement of voting rights. Those instances fall far short of demonstrating a "history and pattern," *Garrett*, 531 U.S., at 368, to which such an expansive prophylactic as §5 could be tailored. And the contrast between the incidents identified by the district court and widespread pre-1965 tactics like fraudulent literacy tests, see, *e.g.*, Thernstrom, Section 5 of the Voting Rights Act: By Now, a Murky Mess, 5 Geo. J.L. & Pub. Pol'y, 41, 44 (2007), demonstrates the utter hollowness of the 2006 record in that regard. Any attempt to suggest otherwise dishonors the extraordinary achievements of the past four

decades and simply ignores the reality of today's America.

The district court cast Mississippi's attempt to implement the National Voter Registration Act as an example of gamesmanship. J.S.App.78-79, 131. In the district court's view, Mississippi's failure to adopt the Act's procedures for federal elections as the State's own for state elections, see *Young* v. *Fordice*, 520 U.S. 273, 279-280 (1997), was an effort to thwart a federal court's ruling eight years earlier striking down Mississippi's dual registration system, see *Operation PUSH* v. *Allain*, 674 F.Supp. 1245 (ND Miss. 1987), aff'd *sub nom. Operation PUSH* v. *Mabus*, 932 F.2d 400 (CA5 1991). Even assuming that Mississippi's actions in 1995 were an effort to avoid the court's 1987 ruling, which is not obvious, an eight-year gap between state actions hardly constitutes a pattern, let alone a problem that cannot effectively be addressed through litigation.

The court also considered *Dillard* v. *Town of North Johns*, 717 F.Supp. 1471 (MD Ala. 1989), an example of iterative state action, in this case to avoid the effects of a consent decree. J.S.App.131. As a result of other litigation, the town agreed to replace its at-large electoral system with single-member districts. *Dillard*, 717 F.Supp., at 1473. Following the agreement, but before the election, Alabama, with preclearance, applied its financial disclosure laws to candidates for municipal office. *Ibid.* The mayor of North Johns received the newly required forms and assisted white candidates with them. *Id.*, at

1474-1475. The mayor refused to assist two African-American candidates, and the court found that the town, through only its mayor, intentionally discriminated against those candidates. *Id.*, at 1475-1476. Not only were these the isolated actions of a single person, but they were successfully addressed through §2 litigation. *Ibid.* Section 5 would not have prevented the mayor's actions because he would not have submitted them for preclearance. This isolated, 20-year-old incident is no evidence that covered jurisdictions today continue to require federal oversight.

Finally, the court credited the events in Waller County, Texas as an example of gamesmanship. J.S.App.131. In 1978, a district court permanently enjoined the Waller County registrar's practice of presuming students of Prairie View A&M University, a historically black college, were not residents and requiring them to complete a registration questionnaire not required of other citizens. *United States* v. *Texas*, 445 F.Supp. 1245, 1261 (SD Tex. 1978), aff'd *sub nom. Symm* v. *United States*, 439 U.S. 1105 (1979). In 2004, the Waller County district attorney threatened to prosecute illegal voters, and he specifically identified students who he said were not entitled to a "special definition of 'domicile' for voting purposes." Evidence of Continued Need, at 1241-1242 (appendix to statement of Nadine Strossen). The Texas Secretary of State and Attorney General immediately informed the district attorney that he could not block registration and that no residency presumption could be applied to students that was not applied

to all voters in Texas. *Id.*, at 1242-1243. The NAACP and students filed suit, but, as the ACLU noted, "[g]iven the unambiguous position taken by the state, the law suit was quickly settled." *Id.*, at 1243. Later, county commissioners reduced the amount of time for early voting, which affected students who would have been on spring break on election day. J.S.App.92. The NAACP filed suit, and the county restored the full early voting period. *Ibid.*

The years-long gap between such incidents demonstrate that this is not an example of a jurisdiction systematically avoiding the rulings of the federal courts. And the swift actions of state officials and effectiveness of private litigation demonstrate that §5 is unnecessary to remedy these one-off occurrences, as the VRA itself recognizes. See 42 U.S.C. §1973*b*(d).[10]

Because the district court could cull from the legislative record only three highly debatable "examples" of gamesmanship supporting reauthorization of

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[10] Moreover, incidents involving student-voter registration often bear no hint of racial discrimination. "Overly restrictive or vague residency requirements in state law confuse both election officials and students seeking to register alike. Because of this confusion, college students across the country have received false or misleading information on their eligibility to vote and the consequences of registering to vote." Ensuring the Right of College Students to Vote: Hearing Before the Subcomm. on Elections of the Comm. of H. Admin., 110th Cong. (2008) (statement of Rep. Robert Brady); see, *e.g.*, Evidence of Continued Need, at 1240-1241 (appendix to statement of Nadine Strossen).

§5, it relied on other evidence to justify extending it until 2031. Although acknowledging that "*section 2* contains the Act's basic prohibition against racial discrimination in voting," J.S.App.93 (emphasis added), the district court treated §2 litigation as evidence of the continued need for the far different §5 remedy. J.S.App.93-95. The court acknowledged, however, that Congress knew of only 14 §2 cases over the 23 years between 1982 and 2005 containing findings of intentional discrimination. J.S.App.93. Recognizing that this is not a large number, the court nevertheless asserted that those cases "offer powerful evidence." J.S.App.95. But of the eight cases the court specifically discussed, five involved events that occurred before 1990.[11]

Two of the three remaining examples of §2 litigation cited as evidence of §5's necessity involved challenges to districting schemes that had received §5 preclearance. See *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 480 (2006) (Stevens, J., dissenting) (*LULAC*); *United States* v. *Charleston County*, 316 F.Supp.2d 268, 274 (DSC 2003). The final example cited also highlights why §5 is no longer justified. In *Pegram* v. *City of Newport News*, No.

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[11] See *Williams* v. *City of Dallas*, 734 F.Supp. 1317, 1325 (ND Tex. 1990); *Dillard*, 717 F.Supp., at 1475; *League of United Latin American Citizens* v. *Midland Indep. Sch. Dist.*, 648 F.Supp. 596, 597 (WD Tex. 1986); *Harris* v. *Siegelman*, 695 F.Supp. 517, 520 (MD Ala. 1988); *Political Civil Voters Org.* v. *City of Terrell*, 565 F.Supp. 338, 340-341 (ND Tex. 1983).

4:94cv79 (ED Va. Nov. 4, 1994), private litigants sued over a city's at-large electoral scheme, and within three months the city agreed to adopt a new multi-district plan before the next elections. Evidence of Continued Need, at 1114 (appendix to statement of Nadine Strossen).

The court also noted that many §2 cases never result in a final judgment because many end in settlements. J.S.App.94. Indeed, Congress heard testimony that in the nine covered States, 653 claims have resulted in various forms of relief. An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 159 (2006) [hereinafter Introduction to Expiring Provisions] (written response of Theodore Shaw). Those cases demonstrate not that §5 is still needed but the opposite, that §2 litigation effectively addresses claims of voting discrimination, and often the resolution does not require long, expensive litigation, as appellees have argued. *Ibid.* (many §2 lawsuits "are resolved through pre-trial settlement or . . . are dismissed because the jurisdiction adopted a remedial plan"). Like the Newport News case, those cases are examples of jurisdictions coming to satisfactory resolutions of possible constitutional violations, not fervently attempting to evade judicial correction.

The district court and Congress also relied heavily on evidence of racially polarized voting. H.R. Rep. No. 109-478, at 34; J.S.App.106. Racially polarized voting cannot justify §5 because it is not behavior

that §5 attempts to remedy, nor that Congress has power to address. Racial bloc voting is private action, not state action. See *Rogers* v. *Lodge*, 458 U.S. 613, 647, n.30 (1982) (Stevens, J., dissenting); Pitts, Section 5 of the Voting Rights Act, 81 Denv. U. L. Rev. 225, 261 (2003). Section 5 targets state action affecting voting; and state action is the only permissible target for Congress's enforcement powers under the Fourteenth or Fifteenth Amendment. See *Morrison*, 529 U.S., at 625-626; *Shaw* v. *Hunt*, 517 U.S. 899, 909-910 (1996); *Freeman* v. *Pitts*, 503 U.S. 467, 495 (1992).

Nor is evidence of racially polarized voting the same as evidence of retrogressive vote dilution. Purposeful dilution of voting power, which nullifies the ability of minority voters "to elect the candidate of their choice," is unconstitutional. *Shaw* v. *Reno*, 509 U.S., at 640-641. But there is no constitutional guarantee of a particular outcome in a nondiscriminatory electoral process. See *LULAC*, 548 U.S., at 428. Rather, to be a constitutional violation, there must be a "voting-procedure[s] change[]" diluting minority voting power. *Miller*, 515 U.S., at 926. As private action wholly disconnected from voting procedures, racial bloc voting cannot justify §5.

Even the evidence cited by the district court and relied upon by Congress that has arguable relevance to §5 still fails to establish a pattern of discrimination that warrants the inversion of our federal system. For example, the court considered disparities between whites and minorities in voter registration and

turnout. J.S.App.58-60. The court noted that Congress found it significant that three States, Florida, Texas, and Virginia, had registration-rate disparities between whites and either African Americans or Hispanics ranging from 11 to 31 percentage points. J.S.App.60 (citing H.R. Rep. No. 109-478, at 25, 29). The largest gap in registration, 31 points between whites and Hispanics, and turnout, 24 points between the same groups, was in Florida, H.R. Rep. No. 109-478, at 29, most of which is not even covered by §5.

While Congress did not apply §5 to Florida, it did apply it to seven States in which African Americans are registered at a rate higher than the national average. S. Rep. No. 109-295, at 8; 152 Cong. Rec. S7980-7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn). In Texas, the registration disparity between whites and African Americans was only five points and in Virginia it was 11 points. H.R. Rep. No. 109-478, at 25, 29. The greatest gap in registration found in a wholly covered State was 16 points between whites and Hispanics in Texas. See *ibid.* Yet Texas's percentage of Hispanic voter registration is more than ten points higher than the national average and several points higher than in California and Colorado, noncovered States with substantial Hispanic populations. Benefits and Costs, at 155 (statement of Edward Blum & Lauren Campbell). Such small disparities, especially with no showing that they are caused by purposeful state action, cannot justify imposing the most intrusive federal law on

nine States, at least some of which have a demonstrably better record than many noncovered States.

The district court recognized that Congress also looked to the number of minority officeholders for evidence that §5 is necessary. J.S.App.62-63. Yet the court dismissed the significant increases—over 1,000 percent since 1965—in the number of minorities serving in elected office in the originally covered States, H.R. Rep. No. 109-478, at 18, reasoning that the gains were "uneven, both geographically and by level of office," J.S.App.63. The court ignored minority gains in local government and focused on statewide office. *Ibid.* But given that §5 affects local governments, and that statewide politicians often emerge from the ranks of local officeholders, the number of minorities elected to local-level public office is significant. Nor did the court compare progress in covered jurisdictions to that in noncovered jurisdictions, despite evidence that covered jurisdictions are doing as well as or better than noncovered regions at electing minority officeholders. *E.g.*, 152 Cong. Rec. S7980-7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn). That minorities are elected to local office suggests that covered jurisdictions are not thwarting voting through iterative and strategic discriminatory changes. If minorities are able to register, vote, and elect candidates of their choice to local office, the reason two[12] of the covered States

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[12] Congress observed that no African Americans had been elected to statewide office in Mississippi, Louisiana, or South

have not elected a minority to statewide office must lie somewhere other than with registration and voting procedure.

Congress and the district court also placed great significance on the Attorney General's objections to voting procedure changes submitted for preclearance between 1982 and 2005. J.S.App.64-81. The court found the increase in the total number of objections after 1982 as evidence of the continuing need for §5. J.S.App.66. The overall increase in objections does not, however, account for the increase in overall submissions. Rather, the rate of objections is more revealing, and the rate decreased from .21 percent from 1983 to 1987, to .05 percent from 1998 to 2002. Introduction to Expiring Provisions, at 219 (statement of Richard L. Hasen). The rate has been even lower since 2002. 152 Cong. Rec. S7980-7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn). This vanishingly small number of objections cannot support an argument that §5 is necessary. The court disregarded declining objection rates, reasoning that this Court upheld §5 in *Rome* despite a sharp decline during the preceding four years. J.S.App.66. But there is an obvious distinction between the significance of a decline from 4.06 percent to 1.31 percent in the first ten years after Congress first enacted §5,

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Carolina. H.R. Rep. No. 109-478, at 33. Louisiana has since, however, elected the country's first Indian-American governor. Another covered State, Virginia, in 1989, chose the country's first elected African-American governor, who was later elected mayor of Richmond, the former capital of the Confederacy.

and the subsequent decline, over *more than 30 years*, that has reduced the objection rate to one-hundredth of its starting point, just above the vanishing point.

The district court also credited the Attorney General's requests for more information as evidence justifying §5. J.S.App.81-83. The court reasoned that, because these requests block a change, they are evidence of repeated efforts to discriminate by avoiding federal judicial mandates. *Ibid.* Of course, as the name suggests, although they indeed block change, even the Attorney General could not determine that they were discriminatory without further information. Moreover, a jurisdiction's voluntary abandonment of a change after a more-information request—like a jurisdiction's settlement of a §2 suit—evidences an attempt to comply with constitutional guarantees, not to evade their enforcement. In any event, such requests are not evidence of the iterative, purposefully discriminatory changes §5 addresses. The fact that requiring a subset of the country's state and local governments to vet changes through the federal government may catch some violations of the VRA that would—and can—otherwise be addressed through §2 litigation remains insufficient justification for §5.

In at least one instance relied on by the court, the request for more information played no material role. Griffin, Georgia, adopted a redistricting plan following the 2000 census that left two of its six districts with an African-American majority although African Americans were 49 percent of the city's population.

Evidence of Continued Need, at 809-810 (appendix to statement of Nadine Strossen). The city sought preclearance, and the Attorney General requested more information. *Id.*, at 809. The city decided not to resubmit the plan but instead use its old malapportioned districts in the upcoming election. *Ibid.* The NAACP filed suit, asserting that the old districts violated the one-person-one-vote standard. *Ibid.* The court scheduled a hearing the next day, and at the hearing the city agreed to form six districts with three having a majority African-American voting-age population. *Ibid.* In other words, case-by-case litigation was sufficient to address instances of discrimination and dilution. Federal review accomplished nothing; private litigation was faster and more effective than §5.

Likewise, the §5 litigation cited by the court demonstrates that private action is more effective than executive review and avoids violence to fundamental notions of federalism. For example, after the 2000 census, Seguin, Texas, proposed redistricting that would have eliminated one of the existing majority-Latino districts. 1 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 109th Cong. 50 (2005) [hereinafter Section 5 History] (testimony of Nina Perales). The Attorney General indicated preclearance was unlikely, and the city withdrew its plan. *Ibid.* The city also closed the candidate filing period before any Latino could file in the election for that majority-minority district. *Ibid.*

MALDEF sued and successfully enjoined the election timetable. *Ibid.* Although the suit was brought under §5, §2 provided a cause of action as well. Regardless, this case demonstrates, like others, that case-by-case litigation under §2 suffices.

Section 5 litigation also includes suits brought by covered jurisdictions seeking judicial preclearance. Here too, the examples gathered by Congress and culled by the district court do not justify the reauthorization of §5 for another quarter-century. For example, the case of Pleasant Grove, Alabama, see J.S.App.84-85, involved annexation of two parcels of land, one in 1969 and the other in 1979. *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 465 (1987). In fact, the Attorney General's objections to these annexations were considered by Congress in its 1981 hearings on reauthorizing the VRA. *Id.*, at 466, n.5. Actions by covered States more than 35 years ago and litigated over 20 years ago cannot establish that the extraordinary conditions justifying §5 in the past continued to exist in 2006.

Faced with a dearth of evidence of the behavior at which §5 is actually aimed, Congress and the district court relied on anecdotal evidence of §5's deterrent effect, reasoning that the effect explained the absence of evidence, while also justifying reauthorization. See J.S.App.108-110. Admittedly, §5 deters change, but there is no evidence that the majority of that change is discriminatory. The court cited three examples, but in one, the case of Seguin, Texas, federal oversight accomplished nothing, and

private litigation achieved a new districting plan. Section 5 History, at 50 (testimony of Nina Perales). In the other two examples, redistricting plans were, purportedly, altered because of the specter of §5 review. J.S.App.110-111. There is no reason, however, to believe that the prospect of §5 review alters behavior that §2 litigation would not. Indeed, the legislative record highlights the effectiveness of litigation under §2 and, in so doing, reveals that there is insufficient evidence to justify another 25 years of §5's emergency response to an extraordinary crisis.

Section 5 may, in fact, retard some changes beneficial to voters in general or minority voters in particular. Section 5 was used, for example, to impede the Georgia legislature's attempt, overwhelmingly supported by African-American legislators, to draw district lines maximizing the influence of African-American voters. *Georgia* v. *Ashcroft*, 539 U.S. 461, 472-475 (2003). Section 5 may also impede covered States from replacing partisan judicial elections with a merit-based selection process, a reform often advocated. And §5 presents opportunities for the Executive to manipulate preclearance toward partisan ends. See *LULAC*, 548 U.S., at 480 (Stevens, J., concurring and dissenting); *Georgia*, 539 U.S., at 497 (Souter, J., dissenting).

3. Section 5 Is Not Geographically Tailored.

The Court found the original enactment of §5 an appropriate exercise of Congress's enforcement power

in part because the prophylactic was "confined to those regions of the country where voting discrimination had been most flagrant." *Boerne*, 521 U.S., at 532-533; cf. *Morrison*, 529 U.S., at 598, 626 (invalid VAWA civil-remedy provision not confined to States with discriminatory history); *Fla. Prepaid*, 527 U.S., at 647 (same for Patent Act and patent infringement). But the current incarnation of §5 imposes its unique federal intrusion on countless jurisdictions, like the district, with no demonstrated history of racially discriminatory governmental action denying or abridging the right to vote and others with no recent history of such conduct. That fact is hardly surprising given that Congress reenacted the §4(b) formula—which triggers coverage for §5—unchanged from its enactment in 1975. Compare 42 U.S.C. §1973*b*(b) with 42 U.S.C. §1973*b*(b) (1976). Congress's failure to enact an updated coverage formula with any hope of tailoring the geographical scope of §5 to the contours of any present-day problem that might exist compels the conclusion that the 2006 enactment of §5 is not a valid exercise of the enforcement power. If Congress intended to reenact legislation that effectively labels an entire swath of the country as so inherently racist that its state and local governments cannot be trusted to fairly protect the voting rights of all their citizens, it needed to make some rational effort to justify that extraordinary declaration.

The coverage formula enacted in 1965 and relying on data through the 1964 presidential election

"was relevant to the problem of voting discrimination"—in 1965—"and Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered." *Katzenbach*, 383 U.S., at 329. There is no rational reason to regard the 2006 formula as relevant at all. Section 5's coverage under the 2006 enactment bears no rational geographical relationship to whatever unconstitutional voting-related conduct may exist today because it is based on proxies from 1972 or earlier. 42 U.S.C. §1973*b*(b). Section 5 today imposes a scarlet letter on residents of covered jurisdictions based on acts of their grandparents or—given our mobile society—other people's grandparents.

Notably, the 2006 enactment of §§4 and 5, premised on data already over 30 years old, will endure through 2031. 42 U.S.C. §1973*b*(a)(8). By 2031, the district, which did not even exist until the late 1980s, will continue to be burdened by requirements based on 60-year-old facts containing nothing specific to the district. Such temporally disconnected evidence cannot be used to draw legitimate territorial boundaries to a remedy to be applied so far into the future. See *Garrett*, 531 U.S., at 369, n.6; *Boerne*, 521 U.S., at 530.

The §4(b) coverage formula relies on two proxies in attempting to identify jurisdictions with histories of voting discrimination: (1) literacy tests or other devices that prohibited voting, and (2) voting registration and turnout rates. 42 U.S.C. §1973*b*(b). Both proxies are out of date and cannot show a recent

"egregious predicate[ ]," *Boerne*, 521 U.S., at 533, of unconstitutional gamesmanship. See *Garrett*, 531 U.S., at 365.

Literacy tests and other devices preventing ballot access have not been used for decades and are permanently banned. 42 U.S.C. §1973*aa*. The use of such devices so far back in time offers nothing helpful to discerning modern conditions.

Even if voting registration and turnout rates are still conceivably useful proxies, the 2006 enactment uses presidential election data from 1964, 1968, and 1972. 42 U.S.C. §1973*b*(b). Had Congress attempted to implement the possibly better proxy of using recent 2000 and 2004 presidential election data, the contours of its remedy would have looked drastically different, particularly if the formula were applied to localized conditions rather than painting States with a broad brush. Cf. Pitts, *supra*, at 280. For example, if coverage were based on voter registration and turnout under 50 percent at the county level during the 2000 and 2004 presidential elections, hundreds of currently covered counties would no longer be covered and counties in States including Maryland, Missouri, and Montana would be newly covered. 152 Cong. Rec. H5180 (daily ed. July 13, 2006) (statement of Rep. Norwood).

Congress made no serious effort to determine if proxies based on 1972 data bear any relation to conditions existing across the country in 2006. Certainly Congress made no meaningful comparison

between previously covered jurisdictions and noncovered ones. Pub. L. No. 109-246, §2(b)(5), 120 Stat. 577 (congressional findings limited to generalized, conclusory statements regarding "the continued need for Federal oversight in jurisdictions covered by the Voting Rights Act of 1965 since 1982"). Congress made no effort to evaluate circumstances in areas on the border of covered jurisdictions, where one would expect to be able to evaluate the value (or lack thereof) of continued §5 coverage. There is simply no reason to believe that statistics about voter registration and participation up to 1972 can be applied to identify intransigent state and local governments set on a path of ingenious defiance.

Moreover, the Court has previously recognized that the bailout provision was important to tailoring the geographic and temporal scope of §5. *Boerne*, 521 U.S., at 533 (noting that bailout was intended "to ensure that the reach of the Voting Rights Act was limited to those cases in which constitutional violations were most likely (in order to reduce the possibility of overbreadth)"). If bailout is indeed unavailable to jurisdictions like the district, it is of no practical use for correcting Congress's reliance on obsolete data and restraining §5's reach.

For some time leading up to the 2006 reenactment, commentators, witnesses, and some Congress members themselves alerted Congress to the need to update the coverage formula or at least further expand the bailout mechanism if a renewed §5 had

any chance of being a valid exercise of the enforcement power. See n.5 *supra*. Congress did neither, and the untargeted, anachronistic §5 it renewed cannot stand.

4. Congress Placed No Meaningful Time Limit on §5.

Each of the two previous enactments of §5 upheld by the Court had precise termination dates, long since past. See *Rome*, 446 U.S., at 181 (noting seven-year termination date of the 1975 enactment). Those time limits were part of what made those earlier enactments constitutionally appropriate legislation when they occurred. *Boerne*, 521 U.S., at 533. But Congress's 2006 reenactment of §5—41 years after the original enactment, extending for an additional 25 years, retaining a coverage formula harking back over 35 years, and based on a record insufficient to show continuing recalcitrance in covered jurisdictions—acknowledges no meaningful time limit.

In upholding the original §5 as a provision with a five-year lifespan, *Katzenbach* characterized it as a response to an acute emergency. 383 U.S., at 334-335 (citing *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398 (1934) (upholding Minnesota's mortgage relief laws as a response to the Great Depression), and *Wilson* v. *New*, 243 U.S. 332 (1917) (upholding the response to a labor dispute threatening to stop all movement in interstate commerce)). Congress cannot indefinitely continue exercising extraordinary powers

in response to an emergency with no showing the emergency persists.

5. Section 5 Is Not Meaningfully Limited in Scope.

Given the lack of any showing that §5 and its coverage formula, as enacted in 2006, are at all targeted at attempts to purposefully evade enforcement of constitutional guarantees like those that justified the original §5, such an overbroad prophylactic cannot stand. Section 5 has no meaningful limitations on its scope that could conform it to any residual purposeful discrimination that may remain.

Like RFRA, §5's "[s]weeping coverage ensures its intrusion at every level of government," *Boerne*, 521 U.S., at 532, projecting the national government's reach down to the neighborhood level. Moreover, §5 covers a vast amount of clearly constitutional government activity in two distinct senses. First, the essence of §5 is that it compels state and local governmental units to invite an arm of the national government—usually the Executive Branch—into their legislative processes. It is certainly not unconstitutional for a state legislature to pass a law or a local authority like the district to pass resolutions in a process that bypasses the federal government. Cf. *Allen*, 393 U.S., at 596 (Black, J., dissenting) (noting that "[p]roposals to give judges a part in enacting or vetoing legislation before it passed were made and rejected in the Constitutional Convention"). Second, out of tens of thousands of changes submitted for preclearance, the

percentage drawing objection from the Department of Justice is minute. Hasen, Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After *Tennessee* v. *Lane*, 66 Ohio St. L. J. 177, 191-192 (2005) (noting that objections were "down to 0.05% from 0.23% in the last three five-year periods" up to 2005). And the vast majority of those objections do not signify the *purposeful* discrimination required for a constitutional violation.

Moreover, in the 2006 enactment of §5, Congress has, in fact, applied a different substantive constitutional standard to covered jurisdictions than applies in the rest of the country. The Court previously held that preclearance could only be denied for vote dilution that was retrogressive, even if the Department of Justice believed it to be motivated by a discriminatory intent, and warned that extending §5 preclearance to cover non-retrogressive discrimination would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts . . . perhaps to the extent of raising concerns about §5's constitutionality." *Reno* v. *Bossier Parish Sch. Board*, 528 U.S. 320, 335-336 (2000). In the 2006 reauthorization, Congress abrogated that case's holding "by clarifying that any voting change motivated by any discriminatory purpose is prohibited under Section 5." H.R. Rep. No. 109-478, at 68.

With no record showing a contemporary predicate of discriminatory gamesmanship throughout covered jurisdictions, §5 cannot be an appropriate remedy when it touches so much activity unrelated to the constitutional guarantee against purposeful voter

discrimination. See *Kimel*, 528 U.S., at 86 (ADEA failed because it "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable" constitutional standard); *Fla. Prepaid*, 527 U.S., at 646 (in the Patent Act, Congress "did nothing to limit the coverage . . . to cases involving arguable constitutional violations"). Like RFRA, §5, as reenacted in 2006, is not "designed to identify and counteract state laws likely to be unconstitutional." *Boerne*, 521 U.S., at 534.

CONCLUSION

For these reasons, the Court should reverse the judgment of the district court and render judgment that the district is entitled to use the bailout procedure or, in the alternative, that §5 cannot be constitutionally applied to the district.

Respectfully submitted,

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APPELLEE'S BRIEF

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In the Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, APPELLANT

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL APPELLEE

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QUESTIONS PRESENTED

1. Whether appellant, a municipal utility district, is statutorily eligible under 42 U.S.C. 1973b(a) to terminate its coverage under Section 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973c.

2. Whether Congress acted within its authority to enforce the constitutional prohibition against discrimination in voting when it reauthorized Section 5 of the VRA in 2006, on the basis of an extensive record demonstrating that, despite considerable progress under Section 5's remedial framework, discrimination against minority voters continues to be a problem in covered jurisdictions and that Section 5 remains a valuable tool in preventing, remedying, and deterring such discrimination.

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BRIEF FOR THE FEDERAL APPELLEE

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1-183) is reported at 573 F. Supp. 2d 221.

JURISDICTION

The judgment of the district court was entered on May 30, 2008 (J.S. App. 184-185). A notice of appeal was filed on July 8, 2008 (J.S. App. 186-192), and the jurisdictional statement was filed on September 8, 2008. This Court noted probable jurisdiction on January 9, 2009. The jurisdiction of this Court rests on 42 U.S.C. 1973b(a)(5) and 28 U.S.C. 1253.

STATEMENT

1. The Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973 *et seq.*, has stood as part of our law for over 40 years. Its "direct result" has been "[s]ignificant prog-

ress * * * in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006 Reauthorization), Pub. L. No. 109-246, § 2(b)(1), 120 Stat. 577. Yet "vestiges of discrimination in voting continue to exist[,] as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process"; the "continued evidence of racially polarized voting in each of the jurisdictions covered * * * demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the" VRA. § 2(b)(2) and (3), 120 Stat. 577. These findings were made by a unanimous Senate, a nearly unanimous House of Representatives (390-33), and signed into law by President Bush. J.S. App. 18.

The 2006 reauthorization continued this Nation's sacred commitment to eradicating the effects of its darkest days. In 1965, one hundred years after Appomattox, Congress enacted the VRA after thorough assessment of the intervening history. Congress intended "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). While much progress has been made over the last four decades, Congress in 2006 acknowledged the still painful reality that this blight has not yet been eradicated. Indeed, "[t]he record compiled by Congress demonstrates that, without the continuation of the [VRA's] protections, racial and language mi-

nority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Reauthorization § 2(b)(9), 120 Stat. 578.

This case concerns Section 5 of the VRA, which provides that "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect" on its coverage date, it must first obtain preclearance. 42 U.S.C. 1973c(a). A covered jurisdiction may seek preclearance for a voting change from the Attorney General or the United States District Court for the District of Columbia. *Ibid.* Preclearance may be granted only if the jurisdiction demonstrates that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. *Ibid.*

Section 5 is limited geographically and temporally. It applies only to "areas where voting discrimination has been most flagrant." *South Carolina*, 383 U.S. at 315. As originally enacted, Section 5 applied to most southern States. 28 C.F.R. Pt. 51 App. When Congress reauthorized Section 5 in 1975, it amended the coverage formula to include jurisdictions with a demonstrated history of discrimination against language minority voters, including the State of Texas. See Act of Aug. 6, 1975 (1975 Amendments), Pub. L. No. 94-73, Title II, 89 Stat. 400; 40 Fed. Reg. 43,746 (1975).

Since its enactment, the VRA's "bailout" mechanism has permitted jurisdictions to bring a declaratory judgment action in the District Court for the District of Columbia to terminate their coverage. VRA § 4(a), 79 Stat.

438. Prior to 2006, Congress had reviewed and amended the bailout provisions on various occasions. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 315; 1975 Amendments § 101, 89 Stat. 400; Voting Rights Act Amendments of 1982 (1982 Amendments), Pub. L. No. 97-205, § 2, 96 Stat. 131.

2. Appellant is a municipal utility district in Travis County, Texas, with an elected board of directors. J.S. App. 18. Because the State of Texas is a covered jurisdiction, appellant is subject to Section 5. See 28 C.F.R. Pt. 51 App.; 28 C.F.R. 51.6. Since 2004, appellant's elections have been conducted jointly with other political entities by Travis County, pursuant to a joint election agreement. J.A. 398-399, 410. Whereas appellant's annual cost of preclearance compliance averaged $223 before 2004, it approaches zero since the 2004 agreement. J.A. 270, 279.

3. Eight days after Congress reauthorized Section 5 in 2006, appellant brought this action in the District Court for the District of Columbia, seeking a bailout or a declaration that Section 5 is unconstitutional. J.S. App. 19. As required by 42 U.S.C. 1973b(a)(5), a three-judge district court was convened. Several individuals and entities intervened as defendants.

The district court granted summary judgment to appellees. J.S. App. 1-183. The court first rejected appellant's claim that it was statutorily eligible to bail out of Section 5 coverage. *Id.* at 20-30. The court noted that the VRA permits only States and their "political subdivisions" to seek bailout, and that the term "political subdivision" includes only counties or other local governmental entities that conduct voter registration when counties do not. *Id.* at 21; see 42 U.S.C. 1973c(a).

The district court then considered appellant's argument that Congress exceeded its constitutional authority when it reauthorized Section 5. J.S. App. 30-153. The court found at the outset that appellant's challenge was essentially facial in nature. *Id.* at 31-32, 144. The court then observed that this Court "has articulated two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments." *Id.* at 32. In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the Court held that when Congress exercises its authority to enforce the Fourteenth Amendment, it has no power to "make a substantive change" in the constitutional standard, and that the Court will therefore look for "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 519-520. But the district court also noted that *South Carolina* applied a more deferential standard for evaluating Congress's exercise of its Fifteenth Amendment authority. J.S. App. 35.

The district court concluded that *South Carolina* provided the appropriate standard for evaluating the continuing validity of VRA Section 5, but applied both standards out of an abundance of caution. J.S. App. 45-50, 118-119. After engaging in a thorough review of the "massive amount of evidence Congress collected," the court found "no doubt that despite the 'undeniable' political progress made by minorities, 'Congress could rationally have concluded' that it was necessary to extend section 5." *Id.* at 118 (quoting *City of Rome* v. *United States*, 446 U.S. 156, 177, 181 (1980)). The court also held that, under *Boerne*'s congruence-and-proportionality standard, Congress had acted well within its constitutional authority. *Id.* at 118-144.

SUMMARY OF ARGUMENT

This case concerns the intersection of two central aspects of the Constitution: the right to vote and the Reconstruction Amendments' prohibitions against racial discrimination. This Court has described voting as the right "preservative" of all others. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). For more than four decades, the VRA has embodied the Nation's solemn commitment to protect this right, which is the cornerstone of our democracy. Accordingly, this Court has upheld the very provision at issue here, Section 5 of the VRA, on four separate occasions. *Lopez* v. *Monterey County*, 525 U.S. 266, 282-285 (1999); *City of Rome* v. *United States*, 446 U.S. 156, 177-178 (1980); *Georgia* v. *United States*, 411 U.S. 526, 534-535 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 337 (1966).

In upholding Section 5 of the VRA, the Court has observed that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting," and has specifically held that "Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States" in enacting Section 5. *South Carolina*, 383 U.S. at 324. The Court has repeatedly highlighted the lengthy congressional deliberations and factfinding that preceded the VRA's enactment and has singled out the geographic and temporal limitations of the Act to emphasize its remedial nature. The 2006 reauthorization was likewise the product of extensive legislative consideration, and it retains the limiting features that ensure the statute is targeted where it is most necessary.

I. One of the features of Section 5 of the VRA that this Court has emphasized as embodying the provision's carefully tailored remedial framework is its "bailout"

mechanism. Notably, Congress has expanded that feature since the VRA's enactment to increase the number of jurisdictions eligible for bailouts. Nevertheless, appellant here seeks a further expansion that the statutory text will not bear. The district court correctly held that only a "political subdivision" as defined in the statute may bail out of coverage. Appellant concedes that it does not satisfy that statutory definition, and its request to bail out was properly denied.

II. a. Appellant's attack on the constitutionality of VRA Section 5's reauthorization also fails. Appellant asserts that there is a conflict between the VRA and this Court's recent pronouncements regarding Congress's Fourteenth Amendment enforcement powers in a line of cases beginning with *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). But nothing in *Boerne* retreats from what this Court repeatedly has said about Section 5 of the VRA. To the contrary, *Boerne specifically reaffirmed* the constitutionality of this provision, singling it out as a paradigmatic example of Congress's appropriate exercise of its enforcement authority. *Id.* at 532-533. As this Court has recognized, the VRA, unlike the statute at issue in *Boerne*, was not an attempt to redefine constitutional rights or to encroach upon the Court's power to say what the law is, but rather represents Congress's response to a century of rampant discrimination that denied the voting rights of racial minorities in direct violation of the explicit mandate of the Fifteenth Amendment.

Appellant, at bottom, attempts to set up a strict dichotomy between the deferential review this Court applied in *South Carolina* and its progeny and the more searching congruence-and-proportionality review in *Boerne*. But that dichotomy is false. In both lines of

cases, the Court is answering the same question: Is Congress enforcing constitutional protections through appropriate means? In *Boerne*, the Court articulated the congruence-and-proportionality analysis to discern whether Congress was enforcing an established right—as it is empowered to do under the Constitution—or whether it was attempting to redefine the Fourteenth Amendment's meaning—a power vested in the judicial Branch. 521 U.S. at 529-536. But both lines of cases agree that where, as here, Congress seeks to enforce a right that is at the core of the protection afforded by the Reconstruction Amendments, this Court's review of the appropriateness of Congress's chosen method of protection is highly deferential.

B. The 2006 reauthorization did not transmute VRA Section 5 from a remedy to a redefinition of constitutional rights. Appellant does not even challenge the few substantive changes Congress made. Most importantly, Congress maintained all of the features of Section 5 that this Court has singled out as demonstrating its remedial nature, including its limited application to those jurisdictions with the worst histories of racial discrimination in voting, a sunset date for the provision as a whole, and a mechanism by which States or political subdivisions that have fully complied with Congress's remedy can terminate the provision's coverage.

Of course, the question Congress faced in 2006 was not whether to impose the remedial framework of Section 5 preclearance as an initial matter, but whether to retain the remedy already in place. The immense record amassed by Congress provides ample evidence that Section 5 has played, and continues to play, a critical role in preventing and deterring discriminatory electoral changes. It has, moreover, helped to preserve the hard-

won progress minority voters have achieved over recent decades in having their electoral voices heard.

ARGUMENT

I. ONLY THE STATE OF TEXAS OR TRAVIS COUNTY MAY APPLY TO TERMINATE APPELLANT'S COVERAGE UNDER SECTION 5

Appellant contends (Br. 2, 14-26) that, because it has not engaged in any voter discrimination, it is entitled to terminate its Section 5 coverage. That argument is foreclosed both by the VRA's text and by decisions of this Court.

A. The Text Of Section 4(a) Forecloses Appellant's Argument That It Is Entitled To Seek Termination of Coverage

As originally enacted in 1965, Section 4(a) permitted only two categories of jurisdictions to seek bailout: (1) designated States, and (2) "political subdivision[s]" separately designated for coverage where the State had not been. VRA § 4(a), 79 Stat. 438 (42 U.S.C. 1973b(a)(1) (Supp. I 1965)). Section 14(c)(2) of the Act has always defined a "political subdivision" to be "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. 1973*l*(c)(2). Appellant acknowledges (Br. 21) that it does not qualify under either of the two original bailout categories. See J.A. 419-420, 437.

Instead, appellant (Br. 15-19) looks to the 1982 Amendments for support. In 1982, Congress added a third type of jurisdiction eligible for bailout: "any political subdivision of [a covered] State * * * though such

[coverage] determinations were not made with respect to such subdivision as a separate unit." § 2(b)(2), 96 Stat. 131 (42 U.S.C. 1973b(a)(1)). That expansion permitted a "political subdivision" within a designated State to apply for termination. Appellant, however, does not qualify under this new category.

As noted above, Section 14(c)(2) of the VRA defines the term "political subdivision" as "any county or parish" or certain other entities that "conduct[] registration for voting" when the county does not. 42 U.S.C. 1973*l*(c)(2). Because appellant is not a "political subdivision" as so defined, the district court correctly held that appellant is ineligible to seek bailout. J.S. App. 20-30. See *Burgess* v. *United States*, 128 S. Ct. 1572, 1577 (2008).

That conclusion is confirmed by the statutory structure. The 1982 Amendments added the new category of "political subdivision[s]" eligible to bail out as a clause within the first sentence of Section 4(a), situated between the clauses that identify the two categories that were originally eligible—a designated State and a designated "political subdivision." See 42 U.S.C. 1973b(a)(1). As discussed above, it is undisputed that the latter reference to designated "political subdivision[s]" reaches only subdivisions as defined in Section 14(c)(2). Congress is presumed to have intended "political subdivision" to have the same meaning in the new clause. *Brown* v. *Garner*, 513 U.S. 115, 118 (1994). Indeed, Congress modified the new reference to "political subdivision" with the phrase "though such [coverage] determinations were not made with respect to such subdivision as a separate unit," 42 U.S.C. 1973b(a)(1), thereby confirming that it refers only to a "political subdivision" of

a type as to which a coverage determination *could* have been made under Section 4(b), 42 U.S.C. 1973b(b).

Moreover, the 1982 Amendments provide that the "State or political subdivision" seeking bailout must demonstrate that both it and "all governmental units within its territory" have complied with Section 5. 42 U.S.C. 1973b(a)(1)(D), (E), (F), and (a)(3). This language establishes that smaller "governmental units" are covered under Section 5 because they are part of a covered State or "political subdivision." See *United States* v. *Board of Comm'rs*, 435 U.S. 110, 127 (1978) (*Sheffield*) ("The reference to 'State' in § 5 includes political units within it."); *id.* at 129 ("[A]ll political units within" designated political subdivisions are covered). It further indicates that those smaller "governmental units" are not themselves eligible to bail out.

The legislative history of the 1982 Amendments confirms that only a "political subdivision" that satisfies Section 14(c)(2)'s definition qualifies under the new category. H.R. Rep. No. 227, 97th Cong., 1st Sess. 2 (1981) (*1981 House Report*) ("The standard for bail-out is broadened to permit political subdivisions, as defined in Section 14(c)(2), in covered states to seek bail out although the state itself may remain covered."); S. Rep. No. 417, 97th Cong., 2d Sess. 2 (1982) (*1982 Senate Report*). That history reflects Congress's determination that "[t]owns and cities within counties may not bailout separately" because, "[a]s a practical matter * * * we could not expect that the Justice Department or private groups could remotely hope to monitor and to defend the bailout suits." *Id.* at 57 n.192, 69; *1981 House Report* 41.

Longstanding regulations implementing the VRA, 52 Fed. Reg. 486 (1987), which are entitled to "substantial deference," *Lopez*, 525 U.S. at 281, similarly provide

that, aside from designated States and separately covered "political subdivision[s]," only "political subdivision[s]"—as defined in Section 14(c)(2) of the Act—within fully covered States may apply for bailout. 28 C.F.R. 51.2, 51.5. Because Congress made no change when it reauthorized the VRA in 2006, it is presumed to have endorsed that interpretation. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

B. This Court's Decisions Confirm That Appellant's Section 5 Coverage Status Depends On That Of The State Or County In Which It Is Located

Brushing aside all relevant interpretive sources to the contrary, appellant argues (Br. 17-20) that under this Court's decisions in *Sheffield* and *Dougherty County Board of Education* v. *White*, 439 U.S. 32 (1978), the definition of "political subdivision" in Section 14(c)(2) applies only to coverage determinations under Section 4(b). Those decisions hold that Section 5's preclearance requirements apply not only to the designated "State" or "political subdivision," but to any governmental unit within such a designated entity. See *Sheffield*, 435 U.S. at 127; *Dougherty County*, 439 U.S. at 44 (applying *Sheffield* to school board). According to appellant (Br. 20), *Sheffield* and *Dougherty County* necessarily rested on the conclusion that a smaller governmental unit like appellant is a "political subdivision" of a designated State as that phrase is used in Section 5, 42 U.S.C. 1973c(a), and that, by parity of reasoning, appellant is also a "political subdivision" eligible to apply for termination under Section 4(a)(1), 42 U.S.C. 1973b(a)(1).

The Court rejected appellant's reading of *Sheffield* in *City of Rome*. It explained that *Sheffield* "*did not hold* that cities such as Rome are 'political subdivisions'

under §§ 4 and 5." *City of Rome*, 446 U.S. at 168 (emphasis added). To the contrary, *Sheffield* held that, in light of the statutory structure and purposes, "§ 5's preclearance requirement for electoral changes by a covered 'State' reached all such changes made by political units in that State." *Ibid.*; see *Sheffield*, 435 U.S. at 127 ("[T]he reference to 'State' in § 5 includes political units within it.").

Appellant places considerable weight on a footnote in *Sheffield* commenting that "Congress's exclusive objective in § 14(c)(2) was to limit the jurisdictions which may be separately designated for coverage under § 4(b)." 435 U.S. at 130 n.18. On that basis, appellant argues (Br. 18-21) that *Sheffield* held that the statutory definition of "political subdivision" in Section 14(c)(2) does not apply beyond Section 4(b) and that Congress would therefore have understood the definition not to control when it used that term in the 1982 expansion of Section 4(a)'s bailout provision. But appellant misreads *Sheffield*. Footnote 18 merely reiterated the Court's conclusion that the definition of "political subdivision" in Section 14(c)(2) does not "*limit*[] the scope of § 5." 435 U.S. at 126 (emphasis added). In other words, even though governmental units such as appellant are not "political subdivision[s]" as defined in the Act, the Act reaches them because the "reference to 'State' in § 5 includes political units within it." *Id.* at 127.

Even if *Sheffield*'s footnote 18 were ambiguous, *City of Rome* made clear that *Sheffield* "did not hold that cities * * * are 'political subdivisions' under §§ 4 and 5," or that the phrase "political subdivision" as used in those sections has any meaning other than that given by Section 14(c)(2). 446 U.S. at 168; *id.* at 168 n.5 (quoting statutory definition of "political subdivision"). Most sig-

nificantly, whereas *Sheffield* "did not even discuss the bailout process," *City of Rome* specifically held that a "city is not a 'political subdivision' for purposes of § 4(a) 'bailout.'" *Id.* at 168. Thus, when Congress enacted the 1982 Amendments, it necessarily understood that the statutory definition of "political subdivision" would apply to that phrase in the amended Section 4(a).

Appellant insists (Br. 23-26) that the Court must nonetheless interpret Section 4(a) to permit jurisdictions smaller than counties to apply for bailout or risk imperiling the constitutionality of Section 5. The canon of constitutional avoidance "has no application in the absence of statutory ambiguity," *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001), and, as explained above, Section 4(a) is not ambiguous.

In any event, reading the statute according to its terms does not raise a serious constitutional question. See pp. 15-55, *infra*. This Court has never suggested that the constitutionality of Section 5 was dependent upon every jurisdiction subject to preclearance being provided an avenue to bail out. Indeed this Court has upheld Section 5 when the bailout standard was far stricter than it is now, and even in the face of a constitutional challenge in *City of Rome* by an entity subject to Section 5 that could *not* seek bailout. *City of Rome*, 446 U.S. at 167; *id.* at 193 (Stevens, J., concurring). The text of both the Fourteenth and Fifteenth Amendments refer to "any State," and Congress therefore may properly choose to exercise its enforcement power at that level, or at a level that encompasses "political subdivision[s]" as defined in the VRA, but not still smaller governmental units.

II. AS THIS COURT HAS REPEATEDLY HELD, SECTION 5 OF THE VRA IS "APPROPRIATE LEGISLATION" TO ENFORCE THE CONSTITUTION'S EXPRESS PROHIBITION AGAINST RACIAL DISCRIMINATION IN VOTING

Beginning in *South Carolina*, this Court has upheld the constitutionality of Section 5 of the VRA on four separate occasions. See p. 6, *supra*. Appellant insists that this Court's decision in *Boerne* alters the Court's conclusions. But *Boerne* itself took great care to single out Section 5 of the VRA as the paradigmatic example of Congress's appropriate use of the enforcement power. 521 U.S. at 518, 525-526 (noting Court's continuous recognition of necessity for VRA's "strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination").

As the district court emphasized, Section 5 of the VRA is justified under the strictest reading of *Boerne*, and therefore *a fortiori* under the more deferential terms in which this Court has characterized its review of that Section in the past. J.S. App. 118-119. Indeed, even when applying *Boerne*'s congruence-and-proportionality test, the Court has compared other statutes to VRA Section 5's example. See, *e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 519 n.4 (2004); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 737-738 (2003); *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 373 (2001) (characterizing Section 5 as a "detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified"). Indeed, the Court in *Lopez* specifically quoted *Boerne* in the course of upholding Section 5 of the VRA. 525 U.S. at

282-283 (quoting *Boerne*, 521 U.S. at 518). What was permissible in *Lopez* is permissible today, particularly in the wake of the updated, and near-unanimous, judgment by both political Branches in 2006 that Section 5 remains necessary to prevent violations of the Fourteenth and Fifteenth Amendments.

A. The Court Applies A Deferential Standard Of Review When Congress Is Enforcing, Not Reinterpreting, Constitutional Guarantees At The Heart Of The Reconstruction Amendments

1. Congress's authority to enforce the Reconstruction Amendments' voting guarantees is as broad as that under the Necessary and Proper Clause

The text of the Fourteenth and Fifteenth Amendments vests Congress with the "power to enforce" their substantive protections "by appropriate legislation." U.S. Const. Amend. XIV, § 5; *id.* Amend. XV, § 2. See also *id.* Amend. XIII, § 2. Those words were the deliberate product of the Reconstruction Amendments' Framers' recognition that the Fifteenth Amendment's prohibition on States denying "[t]he right of citizens * * * to vote * * * on account of race," *id.* Amend. XV, § 1, and the Fourteenth Amendment's protections against racial discrimination would require broad new legislative powers.

The Amendments' enforcement provisions constitute "'a positive grant of legislative power' to Congress" that this Court has consistently described in "broad terms." *Boerne*, 521 U.S. at 517 (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)). *Boerne* itself quoted this Court's early pronouncement:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the [Reconstruction] amend-

> ments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 517-518 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-346 (1879)).

The use of the word "appropriate" in the Amendments' enforcement clauses is significant. As *Ex parte Virginia* suggested, and *South Carolina* made explicit, 383 U.S. at 326-327, that phrasing echoed Chief Justice Marshall's classic statement in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), of Congress's broad authority under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch, 17 U.S. (4 Wheat.) at 421. Accordingly, "the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution." *Ibid.*

Those who adopted the Reconstruction Amendments were deeply familiar with *McCulloch* and relied on it in invoking Congress's new powers. See Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne *v.* Flores *and the Original Understanding of Section 5*, 109 Yale L.J. 115 (1999). Most notably, Congress relied on *McCulloch* in enacting Sec-

tion 1 of the Civil Rights Act of 1866, pursuant to the Thirteenth Amendment's enforcement clause. Ch. 31, 14 Stat. 27 (42 U.S.C. 1982). As this Court pointed out, the legislation's floor manager, Representative Wilson, "recalled the celebrated words of Chief Justice Marshall in *McCulloch*" in "urging that Congress had ample authority to pass the pending bill." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968). Wilson quoted *McCulloch*, 17 U.S. (4 Wheat.) at 423:

> Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department and to tread on legislative ground.

Cong. Globe, 39th Cong., 1st Sess. 1118 (1866). See *id.* at 1836 (Rep. Lawrence) ("[T]he degree of necessity is a question of legislative discretion, not of judicial cognizance.") (citation omitted).

This Court, consistent with *McCulloch*'s broad standard, has repeatedly reaffirmed that Congress is "entitled to much deference" in "determin[ing] whether and what legislation is needed to secure the guarantees" of the Reconstruction Amendments. *Boerne*, 521 U.S. at 536 (quoting *Morgan*, 384 U.S. at 651). The Constitution commits to Congress the task of "assess[ing] and weigh[ing] the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by" the federal legislation.

Morgan, 384 U.S. at 653. As this Court's precedents explain, deference to Congress is highest when it enforces the core protections of the Reconstruction Amendments. "It is not for [the Court] to review the congressional resolution of these factors. It is enough that [the Court] be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Ibid.*; see *Civil Rights Cases*, 109 U.S. 3, 14 (1883).

So, for example, this Court's decisions have consistently applied *McCulloch* in examining the scope of Congress's powers under the enforcement clauses in the Reconstruction Amendments to address racial discrimination. "Congress' authority under § 2 of the Fifteenth Amendment" is "no less broad than its authority under the Necessary and Proper Clause." *City of Rome*, 446 U.S. at 175; *Jones*, 392 U.S. at 439 (Thirteenth Amendment "clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*'") (quoting *Civil Rights Cases*, 109 U.S. at 20); *South Carolina*, 383 U.S. at 326 (*McCulloch* provides the "basic test to be applied in a case involving § 2 of the Fifteenth Amendment"); see also *Lane*, 541 U.S. at 561 (Scalia, J., dissenting) (noting the "expansive" construction given the enforcement clauses with respect to measures directed against "*racial discrimination*"). Accordingly, with respect to Section 5 of the VRA, the Court has specifically upheld Congress's power to reach "voting practices that have only a discriminatory effect." *Lopez*, 525 U.S. at 266 (quoting *City of Rome*, 446 U.S. at 175); see *South Carolina*, 383 U.S. at 334.

Even outside the context of racial discrimination, Congress "is not confined to * * * merely parrot[ing] the precise wording of the" constitutional prohibition

itself. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000). Rather, it may "prohibit[] a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Ibid.* For example, Congress may "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent." *Lane*, 541 U.S. at 520.

2. Boerne *recognizes that substantial deference is owed to legislation that enforces, and does not reinterpret, core constitutional guarantees*

a. Appellant dismisses (Br. 39) *McCulloch* as "dictum," contending that *Boerne* requires legislation to be struck down if not "carefully tailored to the temporal, geographic, and other contours of predicate violations of substantive rights" protected by those Amendments. *Id.* at 37. But *Boerne* and succeeding cases held only that Congress lacks the authority, under the guise of enforcing the Fourteenth Amendment, to "substantively redefine the States' legal obligations." *Kimel*, 528 U.S. at 88-89; see *Boerne*, 521 U.S. at 532. Those cases did not involve legislation, such as the VRA, aimed at remedying and deterring violations of the core constitutional right, explicitly set forth in the Fifteenth Amendment itself, that the right to vote not be "denied or abridged * * * on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV, § 1.[1]

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[1] The district court correctly concluded that VRA Section 5 is Fifteenth Amendment legislation. J.S. App. 51-56. The "language minorities" protected by the 1975 Amendments include specified groups recognized as having race or color characteristics: "American Indian, Asian American, Alaskan Natives or of Spanish heritage." 42 U.S.C. 1973*l*(c)(3). This Court has described such groups as "racial." See *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2747 n.2 (2007) (describing "racial breakdown" among "Asian-Ameri-

It is one thing when Congress acts to overrule a constitutional decision of this Court. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (It is the judiciary's power "to say what the law is."). It is quite another when Congress accepts this Court's decisions as defining the parameters of a constitutional right and then acts to prevent violations of that right. In the latter situation, Congress is enforcing a substantive guarantee as defined by this Court, and the only question is whether Congress's means are "appropriate." When Congress acts in that sphere, *McCulloch* affords broad deference to its judgments about what remedies are appropriate.[2] See *City of Rome*, 446 U.S. at 175; *Morgan*, 384 U.S. at 651 (Congress is entitled "to exercise its discretion in determining whether" legislation is needed); *South Carolina*, 383 U.S. at 326; see also *Lane*, 541 U.S. at 561 (Scalia, J., dissenting). *Boerne* recognized, for example, that when Congress adheres to *stare decisis* (as it did in

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can," "African-American," "Latino," and "Native-American" groups); *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 439 (characterizing Latinos as "a racial group"). To the extent VRA Section 5 sweeps more broadly than the Fifteenth Amendment, it lies within the core of the Fourteenth Amendment, which likewise prohibits state-sponsored discrimination on bases such as national origin and language, especially with respect to such fundamental rights as voting. See, *e.g.*, *Morgan*, 384 U.S. at 646-647 (upholding protection under Section 5 of the Fourteenth Amendment of voting rights of Spanish-speaking citizens educated in Puerto Rico).

[2] As explained, pp. 52-54, *infra*, Congress made the prophylactic choice of requiring preclearance in covered jurisdictions after receiving evidence that individual lawsuits could not adequately address or deter constitutional violations, and because Congress believed it would be too difficult for courts in individual cases, acting *ex post*, to distinguish between discriminatory intent and discriminatory effect. Congress was not thereby redefining a right; it was simply acting to protect against the constitutional wrongs that this Court has already identified.

reauthorizing the VRA), it is not redefining a right. See *Boerne*, 521 U.S. at 536.

b. *Boerne* addressed a concern that arises in the context of the Fourteenth Amendment's broad protections of, *inter alia*, "equal protection" and "life, liberty, or property." U.S. Const. Amend. XIV, § 1. Because such protections are phrased at a high level of generality, encompassing or incorporating a broad array of constitutional rights (some protected by strict scrutiny and others by rational basis review), legislation purporting to enforce them can raise the question whether Congress has attempted to "decree the substance of the Fourteenth Amendment's restrictions" rather than "enforce" them. *Boerne*, 521 U.S. at 519. The congruence-and-proportionality test arose out of such circumstances, providing a method to determine whether Congress has crossed "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *Id.* at 519-520; see *Lane*, 541 U.S. at 539 (Rehnquist, C.J., dissenting).

Where those concerns are not present, there is no occasion for heightened review to identify instances of congressional redefinition of substantive constitutional provisions. In contrast to the full present-day sweep of the Fourteenth Amendment, for example, the Fifteenth Amendment's text tightly focuses on race and voting. That focus by its nature constrains Congress's enforcement to the intersection of those subjects, thereby rendering the concerns addressed in *Boerne* inapposite. The Thirteenth Amendment likewise has a closely circumscribed substantive prohibition. And the Court has recognized that Congress possesses broad discretion in enforcing the Thirteenth Amendment, and upheld, one

hundred years after the Civil War, 42 U.S.C. 1982's broad prohibitions against racial discrimination in private property transactions because Congress had identified "badges and incidents" of slavery and "it is for Congress to adopt such appropriate legislation as it may think proper." *Jones*, 392 U.S. at 440, 441 (quoting Cong. Globe, 39th Cong., 1st Sess. at 322 (remarks of Sen. Trumbull)).[3]

Accordingly, from *South Carolina* forward, this Court has not invalidated legislation for straying beyond Congress's enforcement power when such legislation concerned ensuring the rights of racial minorities that the Thirteenth and Fifteenth Amendments specify and this Court has recognized. See *Jones*, 392 U.S. at 437-444 (Thirteenth Amendment, private property discrimination); *Georgia*, 411 U.S. at 538 & n.9 (Fifteenth Amendment, voting); *City of Rome*, 446 U.S. at 173-178 (same); *Lopez*, 525 U.S. at 282-287 (same). Similarly, when Congress has acted to prohibit racial discrimination respecting fundamental rights under the Fourteenth Amendment, where this Court subjects State action to the strictest of scrutiny, Congress's enforcement legislation has been upheld. See *Morgan*, 384 U.S. at 652-658 (Fourteenth Amendment, voting); *Oregon* v. *Mitchell*, 400 U.S. 112, 118 (1970) (opinion of Black, J.) (Fourteenth and Fifteenth Amendments, voting).

On the other hand, where the Court has struck down legislation as beyond Congress's Fourteenth Amendment enforcement power, the Court was not only examining legislation that was outside of the heartland of the Reconstruction Amendments, but also was facing a situ-

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[3] Appellant recognizes (Br. 28, 32) that Thirteenth Amendment cases, and *Jones* in particular, should guide the Court in this case.

ation in which the Court found that Congress was attempting to "make a substantive change in the governing law." *Boerne*, 521 U.S. at 519. In *Boerne*, for example, the Court concluded that the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*, was enacted "in direct response to" this Court's decision in *Employment Division of Human Resources* v. *Smith*, 494 U.S. 872 (1990), and attempted a "substantive alteration" of *Smith*'s First Amendment holding. *Boerne*, 521 U.S. at 512, 534.

The Court has similarly invalidated attempts to subject States to private damages claims under a national regulatory scheme, where the Court had already held that the Constitution permitted States to engage in the targeted conduct. In *Kimel*, for example, the Court noted that Congress attempted to "elevate[] the standard for analyzing age discrimination to heightened scrutiny" and thereby "substantively redefine the States' legal obligations with respect to age discrimination." 528 U.S. at 88-89. Similarly, in *Garrett*, the Court noted with respect to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12111 *et seq.*, that Congress had attempted "to rewrite the Fourteenth Amendment law laid down by this Court in [*City of*] *Cleburne* [v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)]." *Garrett*, 531 U.S. at 374; see also *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640-643 (1999).

c. Even when applying the congruence-and-proportionality standard, the Court has never invalidated a statute securing rights that this Court's decisions recognize as entitled to heightened protection. For example, the Court has upheld Acts of Congress remedying gender discrimination and the denial of judicial access,

which receive heightened Fourteenth Amendment protection. In *Hibbs*, the Court upheld the family leave provisions of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, as appropriate means of enforcing the Fourteenth Amendment's prohibition against "gender-based discrimination." *Hibbs*, 538 U.S. at 728. The Court explained that, because Congress was enforcing a right subject to heightened constitutional review, it was "easier" for Congress to demonstrate the need for legislation enforcing that right. *Id.* at 736. Similarly in *Lane*, the Court upheld Title II of the ADA, 42 U.S.C. 12131 *et seq.*, as applied to the right of citizens with disabilities to have access to courts, a right subject to heightened constitutional protection. *Lane*, 541 U.S. at 528-529.[4]

Thus, the Court does not subject every statute that enforces the Reconstruction Amendments to a form of heightened review. As this Court explained in *Hibbs*, 538 U.S. at 736, where Congress targets state action that is presumptively invalid—*e.g.* state action that infringes on rights subject to heightened constitutional protection—the Court applies a deferential standard of

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[4] While *Hibbs* and *Lane* provoked vigorous dissents, it is notable that the dissenters emphasized other aspects of the legislation that, in the dissenters' view, indicated that the statutes were not genuine responses to constitutional violations but rather attempts to rewrite the constitutional protections themselves. See *Hibbs*, 538 U.S. at 756 (Kennedy, J., dissenting) (citing as "proof * * * that this is an entitlement program, not a remedial statute," the fact that the FMLA did not prohibit facially discriminatory leave policies, as long as those policies satisfied the federal floor applicable to private employers); *Lane*, 541 U.S. at 549-551 (Rehnquist, C.J., dissenting) (stressing ADA Title II's breadth as evidence it was an "attempt to legislatively 'redefine the States' legal obligations' under the Fourteenth Amendment") (quoting *Kimel*, 528 U.S. at 88).

review. In such cases, the Court examines whether Congress reasonably determined there was a need for such legislation, but does not reexamine the historical evidence on which Congress relied to make an independent determination of that need. Compare *South Carolina*, 383 U.S. 308-315, *Morgan*, 384 U.S. at 651-656, *City of Rome*, 446 U.S. at 181-182, *Hibbs*, 538 U.S. at 729-736, and *Lane*, 541 U.S. at 524-529, with *Boerne*, 521 U.S. at 530-531, *Kimel*, 528 U.S. at 89-91, and *Garrett*, 531 U.S. at 368-372.[5]

Nor does the Court need to engage in heightened review respecting each feature of a remedial scheme once the Court has recognized in a prior decision concerning the statute that Congress has not attempted, as a substantive matter, to redefine the constitutional standard. For example, this Court did not invoke "congruence and proportionality" in upholding Section 5 of the VRA when its constitutionality was last before this Court, even though its decision post-dated *Boerne* by two years. See *Lopez*, 525 U.S. at 282-285.

3. Section 5 of the VRA does not redefine substantive constitutional standards, but rather remedies and deters violations of core constitutional rights

a. This Court has recognized in *South Carolina*, *City of Rome*, and *Lopez* that Section 5 of the VRA does not redefine constitutional rights. Nothing in the 2006 reauthorization calls those previous decisions into ques-

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[5] In *United States* v. *Georgia*, 546 U.S. 151 (2006), the Court upheld Title II of the ADA as applied to actual constitutional violations without even inquiring whether Congress was responding to a pattern of constitutional violations, because the Court recognized that Congress's authority to provide "remedies against the States for *actual* violations of" the Constitution was clear. *Id.* at 158.

tion. *Boerne* itself termed Section 5 of the VRA "remedial," and also recognized that Congress "must have wide latitude in determining" whether it is enforcing a constitutional right. 521 U.S. at 520, 526.

The Fifteenth Amendment contains but one prohibition: governments may not discriminate on the basis of race with respect to voting. Racial discrimination with respect to the "fundamental" right to vote is also among the core interests of the Fourteenth Amendment, receiving the strictest scrutiny. See *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (citation omitted). "Above all else, the framers of the Civil War Amendments intended to deny States the power to discriminate against persons on account of their race." *Mitchell*, 400 U.S. at 126 (opinion of Black, J.); see *South Carolina*, 383 U.S. at 309, 329 (noting the "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution"); *City of Rome*, 446 U.S. at 182 (1975 VRA extension responds to "the perpetuation of 95 years of pervasive voting discrimination").

Thus, Section 5 of the VRA operates at the intersection of a citizen's most fundamental right in our democracy and the most constitutionally invidious form of governmental discrimination. It is, moreover, limited in geographic scope "to those regions of the country where voting discrimination had been most flagrant," affects only the "discrete" issue of voting, and allows covered jurisdictions to terminate coverage if they can demonstrate compliance with the remedial scheme. *Boerne*, 521 U.S. at 532-533; 42 U.S.C. 1973b(a); see pp. 32-40, *infra*. Those limitations plainly demonstrate that the Act is designed to remedy and prevent violations of the constitutional right, not to substantively redefine the

meaning of the Constitution itself. If Congress sought to redefine a constitutional right, it would hardly do so through a statute that applies to only 9 covered States and 66 individual political subdivisions, is temporally limited, and provides for termination of coverage.

b. Appellant does not seriously contend that Section 5 redefines a substantive constitutional rule. Indeed, although appellant challenges the reauthorization of VRA Section 5 on the ground that the *procedural* preclearance requirement is overly intrusive on States and local governments, appellant does not challenge the *substantive* standard by which election changes are reviewed under Section 5. See Br. 38; pp. 55-57, *infra*.

To the contrary, appellant characterizes Section 2 of the VRA as "mirror[ing] § 1 of the Fifteenth Amendment, and the Act's other permanent substantive provisions aim directly at the heart of the actual discrimination the Constitution forbids." Br. 38. Section 2 prohibits the application of any "voting qualification or prerequisite to voting or standard, practice, or procedure * * * in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973(a). Section 5, in turn, requires covered jurisdictions to show that any change to an existing voting "qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" when compared to standards and procedures previously in place. 42 U.S.C. 1973c(a).

Although "[t]he inquiries under §§ 2 and 5 are different," *Bartlett* v. *Strickland*, No. 07-689 (Mar. 9, 2009), slip op. 20 (plurality opinion), appellant does not contend that any such differences between them render Section

5 an impermissible "attempt to substantively redefine the States' legal obligations," *Kimel*, 528 U.S. at 88-89. Both Section 2 and Section 5 are "prophylactic" enforcement measures. See *Lane*, 541 U.S. at 520. Each, for example, reaches voting laws that have a discriminatory "result[]" or "effect," 42 U.S.C. 1973(a), 1973c(a), whereas the Constitution has been construed to prohibit only state action with a discriminatory intent, see, *e.g.*, *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion). Because of the difficulties inherent in proving intentional discrimination, however, a law that prohibited only intentional discrimination would of necessity *under*enforce the constitutional right, *i.e.*, leave some instances of intentional discrimination unremedied because intent could not be proved. Thus, on the same day *City of Mobile* was decided, the Court made clear that, "under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect." *City of Rome*, 446 U.S. at 175; see *Bush* v. *Vera*, 517 U.S. 952, 990-991 (1996) (O'Connor, J., concurring). At least with respect to racial discrimination, then, there has never been any question that such prophylactic legislation is permissible to enforce the guarantees of the Reconstruction Amendments. See *Lane*, 541 U.S. at 560-563 (Scalia, J., dissenting).

This Court has not once applied the kind of heightened scrutiny appellant seeks when reviewing the particularities of remedial legislation adopted by Congress to prevent further unconstitutional racial discrimination. Although appellant challenges preclearance as a "severe intrusion on state sovereignty," Br. 42, Section 5 is a permissible means to enforce the fundamental guarantees of the Fourteenth and Fifteenth Amendments, which themselves necessarily reordered the federal-

state balance. In *Lopez*, for example, the Court acknowledged that the Act exacts federalism costs by "authoriz[ing] federal intrusion into sensitive areas of state and local policymaking," but held that the "Act was passed pursuant to Congress' authority under the Fifteenth Amendment, and [the Court has] likewise acknowledged that the Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States." *Lopez*, 525 U.S. at 282. As the Court in *Lopez* noted, moreover, this Court had repeatedly "upheld the constitutionality of § 5 of the Act against a challenge that this provision usurps powers reserved to the States." *Id.* at 283.

B. Section 5's Preclearance Requirement Is An Appropriate Means Of Enforcing The Constitutional Prohibition Against Racial Discrimination In Voting

Whether the Court applies the test articulated in *Boerne*, or deems it unnecessary to do so because the Court has already and repeatedly upheld the VRA as appropriate legislation to enforce the narrow but critical protections of the Fifteenth Amendment, the 2006 reauthorization of Section 5 qualifies as appropriate enforcement legislation designed to redress a problem that infects the root of our democracy.

Under *Boerne*'s congruence-and-proportionality test, the Court first identifies "the constitutional right at issue" that Congress is enforcing. *Garrett*, 531 U.S. at 365. Here, that is the right set forth in the very text of the Fifteenth Amendment—that the right to vote not be abridged on the basis of race or color. The Court then "examine[s] whether Congress identified a history and pattern of unconstitutional" violations of that right, and, if so, whether Congress's remedy is "congruent and pro-

portional to the targeted violation." *Id.* at 368, 374. The district court correctly concluded that the 2006 reauthorization is appropriate enforcement legislation, even if reviewed under the *Boerne* standard. J.S. App. 118-144.

With respect to the VRA, the relevant "historical experience" of unconstitutional discrimination in voting, *South Carolina*, 383 U.S. at 308, is both that which Congress considered during the VRA's enactment and previous extensions and the additional evidence it gathered for the 2006 reauthorization. Although appellant asks this Court to disregard as irrelevant the century-long denial pre-VRA of minorities' most fundamental right to vote in some parts of the Nation, Congress properly declined to do so. Congress began with the set of jurisdictions with the worst histories of unconstitutional racial discrimination in voting. Section 5 of the VRA has always been uniquely limited to the worst offenders, see *id.* at 317-318, and Congress appropriately maintained that focus (while using a bailout process to ensure a proper fit between the remedial scheme and underlying violations).

Congress then assessed the current evidence to determine whether Section 5 had fully accomplished its remedial purposes. Congress reasonably concluded that the evidence before it did not establish that Section 5's protections were no longer needed. The record reflects many recent instances of election changes undertaken with a discriminatory intent. Many others, where intent may have been hard to discern, nonetheless violated the remedial scheme's prohibition against adopting election changes with discriminatory effects. There was, moreover, evidence that Section 5 had prevented or deterred many other discriminatory election changes.

Naturally, the record supporting Section 5's reauthorization in 2006 reflected the considerable progress that has been made since 1965—progress due in large part to Section 5 itself. Nonetheless, "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett*, slip op. 21 (plurality opinion).

1. Section 5's remedial nature is demonstrated by its uniquely limited scope

In *South Carolina*, the Court stressed two features that demonstrated Section 5's remedial nature: (1) it covers only those jurisdictions with the worst records of unconstitutionally disenfranchising minority citizens; and (2) to remedy any "overbreadth," jurisdictions could terminate coverage if they could demonstrate an absence of substantial discrimination that predated the statute's enactment. 383 U.S. at 329-331. Indeed, the Court has stressed that "limitations of this kind," while not required, demonstrate Section 5's remedial nature. *Boerne*, 521 U.S. at 533. Congress maintained those limitations in 2006, including a "bailout" provision substantially expanded since *South Carolina*.

a. Section 5 is geographically limited to those areas with the worst histories of unconstitutional voter discrimination

Congress specifically limited Section 5's coverage to target only those jurisdictions with the worst records of unconstitutionally disenfranchising minority citizens. As the Court detailed in *South Carolina*, Congress found evidence of "an insidious and pervasive evil which had perpetuated itself in certain parts of our country through unremitting and ingenious defiance of the Con-

stitution." 383 U.S. at 309. Although appellant urges the Court to disregard that history and maintains that Congress was required to redetermine the geographic reach of Section 5 based solely on new evidence, Congress properly focused its attention on those jurisdictions with the most egregious histories of constitutional violations and on whether the evidence demonstrated that Section 5's remedial protections were no longer necessary.

i. Each of the States originally covered by Section 5 had "enacted tests [that were] still in use which were specifically designed to prevent Negroes from voting." *South Carolina*, 383 U.S. at 310. Literacy tests were supplemented by "grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter," all of which were administered in a discriminatory manner. *Id.* at 311-312. Blacks with college degrees were precluded from registering to vote, while white illiterates were permitted to do so. *Id.* at 312 nn.12-13. Covered jurisdictions also had histories of white primaries, improper challenges, and racial gerrymandering. *Id.* at 311. Congress started with this reliable "evidence of actual voting discrimination" in certain jurisdictions. *Id.* at 330; S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3, at 13-14 (1965) (*1965 Senate Report*). Congress then "evolved" a formula to identify the worst offenders, based on whether the jurisdiction had employed "tests and devices for voter registration" and had a particularly low voting rate. *South Carolina*, 383 U.S. at 329-330.

This Court has recognized that the coverage formula was essentially reverse-engineered to capture those jurisdictions "where voting discrimination had been most

flagrant." *Boerne*, 521 U.S. at 533. To correct for any under- or over-inclusiveness, Congress provided that additional jurisdictions could be subjected to a preclearance requirement upon a sufficient showing of unconstitutional voting discrimination, 42 U.S.C. 1973a(c), and, as discussed above, Congress provided that designated jurisdictions could terminate coverage under the bailout mechanism, 42 U.S.C. 1973b(a).

When Congress extended Section 5 to protect language minority voters, Congress took particular note of the history of discrimination against such citizens in Texas. The Senate Report documented Texas's "long history of discriminating" against black and Mexican-American citizens "in ways similar to the myriad forms of discrimination practiced against blacks in the South." S. Rep. No. 295, 94th Cong., 1st Sess. 25 (1975) (*1975 Senate Report*). The report chronicled Texas's discriminatory history, including restrictive registration devices, white primaries, poll taxes, intimidation schemes, and vote dilution techniques. *Id.* at 25-26. Such conduct included "acts of physical, economic, and political intimidation when [minority] citizens [did] attempt to exercise the franchise." *Id.* at 26. Texas was designated for coverage under Section 4(b) of the VRA on September 23, 1975, and it and all of the political entities within it became subject to Section 5 as a result. 40 Fed. Reg. at 43,746; *Sheffield*, 435 U.S. at 127; see *Briscoe* v. *Bell*, 432 U.S. 404, 405-406 (1977) (declining to review Texas's designation for coverage, but noting Congress had before it "'overwhelming evidence' showing 'the ingenuity and prevalence of discriminatory practices that have been used to dilute the voting strength and otherwise affect the voting rights of language minorities'") (quoting *1975 Senate Report* 30, 35); *City of Rome*, 446 U.S.

at 193 (Stevens, J., concurring) (finding it "clear that remedies for discriminatory practices that were widespread within a State may be applied to every governmental unit within the State even though some of those local units may have never engaged in purposeful discrimination themselves").

ii. When Congress extended the sunset date for Section 5 in 2006, it retained the covered-jurisdiction limitation. Appellant assails Congress's decision not to amend the coverage formula, claiming it is "based on proxies from 1972 or earlier." Br. 58. But, as described above, a jurisdiction's coverage is not simply the result of mechanical application of "proxies." To the contrary, Congress identified appropriate jurisdictions based on their extensive records of discrimination against minority voters.[6] Appellant's more fundamental contention is that Congress in 2006 should have examined all 50 States—and their subdivisions—anew. But neither logic nor the law requires Congress or this Court to turn a blind eye to the grave history of constitutional violations in covered jurisdictions to which the VRA responds.

There is nothing in this Court's precedents to suggest that Congress must continually justify the remedial legislation it adopts under the Reconstruction Amendments' enforcement clauses with fresh evidence of continued unconstitutional conduct on the part of the

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[6] Congress never intended the original coverage formula to serve as an ongoing "measure of an adequate level of political enfranchisement" of minority voters, such that when the criteria no longer applied, it would establish that "the discriminatory efforts had been sufficiently eradicated to warrant removing the safeguards which made the improvement possible." *Joint View of 10 Members of the Judiciary Committee Relating to Extension of the Voting Rights Act of 1965*, 115 Cong. Rec. 5521 (1970).

States. Neither the FMLA nor ADA Title II, upheld in *Hibbs* and *Lane*, has an expiration date, nor is one required. *Boerne*, 521 U.S. at 533. Indeed, it would be odd to require proof of ongoing constitutional violations in order to demonstrate that it is "appropriate" to keep enforcement legislation in place, as such evidence would tend to show that existing legislation was ineffective.

Where a State has been found to have engaged in systematic constitutional violations, it is the province of *Congress* under the enforcement clauses to determine when the evidence is sufficient to demonstrate that the remedial scheme is no longer warranted. Congress has authority not only to remedy past constitutional violations, but to "prevent and deter" further ones. *Hibbs*, 538 U.S. at 728; see *Boerne*, 521 U.S. at 518-519. Once Congress has established a remedial framework for jurisdictions with demonstrated records of constitutional violations, it may reasonably rely, for its decision to maintain that framework, on evidence of likely future unconstitutional conduct far less compelling than existed when it first imposed the remedial and preventive measures.

By way of analogy, in the judicial context, the Court has held that once a constitutional violation is found, the presumption shifts and the burden is on the violator to "demonstrate[] its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution." *Freeman* v. *Pitts*, 503 U.S. 467, 490 (1992). Such a showing requires not only compliance with the Constitution's direct requirements, but also "full and satisfactory compliance with the [court's remedial] decree." *Id.* at 491, 499.

Congress is, of course, not constrained by the institutional limitations that this Court has recognized con-

strain judicial supervision of school districts, but the analogy is nonetheless instructive. Indeed, what is permissible for the judiciary is *a fortiorari* within the power of Congress when it exercises its textually committed enforcement power under the Reconstruction Amendments. Congress found that the covered jurisdictions were the worst constitutional violators, a determination this Court sustained. Congress could permissibly therefore shift the presumption in favor of retaining the remedial scheme it adopted until the evidence demonstrates it is no longer necessary. An especially heavy burden must be imposed on a party seeking to have declared unconstitutional the continuation of a congressionally imposed remedy that this Court has specifically upheld four times as a permissible prophylactic measure against constitutional violations that undermine the very foundations of democracy.

As discussed more fully below, see pp. 41-51, *infra*, Congress determined in 2006, based on an extensive record, that, while VRA Section 5 had been responsible for "[s]ignificant progress" in covered jurisdictions, the remedial scheme had not yet fulfilled its mission. 2006 Reauthorization § 2, 120 Stat. 577. Congress determined that there is sufficient ongoing discrimination to warrant continued Section 5 coverage. Significantly, the evidence before Congress established that there is still more voting discrimination in covered jurisdictions than in non-covered jurisdictions, even excluding evidence arising out of the Section 5 preclearance process itself.

Contrary to appellant's assertion (Br. 59-60), Congress did engage in a "meaningful comparison between previously covered jurisdictions and noncovered ones." Congress examined a study of reported Section 2 suits filed throughout the country between 1982 and 2005,

conducted by the University of Michigan Voting Rights Initiative. *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 2d Sess. 125-126, 202-204 (2006) (*Continued Need*). The study revealed that 57% of the 117 cases with outcomes favorable to minority voters were filed in jurisdictions covered by Section 5, although those jurisdictions comprised less than one-quarter of the Nation's population in 2000. *Id.* at 125-126, 202-203. Thus, covered jurisdictions were subject to *more than twice* their proportional share of successful Section 2 suits, notwithstanding decades of close monitoring by the Attorney General through Section 5. Testimony also revealed that racial bloc voting is more pervasive in covered jurisdictions than in non-covered jurisdictions. *The Continuing Need for Section 5 Pre-clearance: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 48 (2006).[7]

b. Section 5 is temporally limited, and the bailout provision allows jurisdictions demonstrating compliance to terminate coverage

While Congress recognized the continuing need for Section 5 in covered jurisdictions, it also provided for that process ultimately to come to an end. The 2006 reauthorization, like the original VRA and each extension, includes both a sunset date for Section 5 itself and a process by which individual States and political subdivisions may terminate coverage.

The 2006 reauthorization provided that Section 5 would terminate in 25 years and that Congress would reconsider Section 5 after 15 years. 42 U.S.C.

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[7] A study of the 2008 election further indicates that racially polarized voting persists in covered jurisdictions. See Persily Br. 5.

1973b(a)(7) and (8). Those provisions ensure that Congress will take a fresh look at the remedial scheme as a whole to determine whether evidence of compliance with the Constitution and the statutory remedy are sufficient to demonstrate that Section 5's preclearance requirement is no longer appropriate. See *Eldred* v. *Ashcroft*, 537 U.S. 186, 208 (2003) (regarding lengthy copyright extension, courts are "not at liberty to second-guess congressional determinations and policy judgments of this order"). And, of course, Congress is free to remove or modify Section 5 at any earlier date.

Moreover, the 2006 VRA reauthorization retained the bailout mechanism—a feature that this Court has repeatedly highlighted as indicative of Section 5's remedial nature and tailored reach. See *South Carolina*, 383 U.S. at 331; *Briscoe*, 432 U.S. at 411; *Boerne*, 521 U.S. at 533. Notably, the bailout provisions are considerably broader now than when the VRA was first upheld in *South Carolina*.

From the VRA's enactment in 1965 until 1984, only jurisdictions that had been specifically designated under Section 4(b)'s coverage formula were eligible to seek bailout. 42 U.S.C. 1973b(a) and (b) (Supp. I 1965). In 1982 (effective in 1984), Congress expanded bailout eligibility to "political subdivision[s]" of designated States that were not separately designated. 1982 Amendments § 2(b)(2), 96 Stat. 131 (42 U.S.C. 1973b(a)(1)).

In addition, the bailout standard was amended in 1982 to make it substantially more permissive. Until 1984, when the expanded provisions took effect, a bailout required a jurisdiction to demonstrate that it had not engaged in discrimination since *before* the VRA's enactment in 1965. See, *e.g.*, 42 U.S.C. 1973b(a) (1982) (requiring no discrimination for 19 years). The 1982

Amendments now permit bailout if the jurisdiction can demonstrate that it has complied with the remedial scheme in the previous ten years, 42 U.S.C. 1973b(a)(1), thereby creating "an incentive" for covered jurisdictions to comply. *1982 Senate Report* 46, 59. By looking at the previous ten years, the bailout provision focuses on any *recent* discriminatory actions, thereby helping ensure the targeted application of Section 5's preclearance requirement.

Appellant claims (Br. 60) that the current bailout standard is now "of no practical use." As the district court observed, however, every political subdivision to apply for a bailout in the past quarter-century has received one. J.S. App. 12. Appellant's assertion that the bailout is unavailable to any county outside Virginia (Br. 24-26) is disproved by the facts of its own State. As the district court found, one of the Virginia jurisdictions that successfully bailed out has almost as many governmental subunits as the median number of subunits for Texas's political subdivisions. J.S. App. 140. Appellant's assertions are particularly unconvincing since Travis County conducts elections on behalf of the various political units within the County, including appellant, J.A. 398, and would therefore be in a position to gather the requisite information if it believed bailout was warranted. In any event, neither Texas nor Travis County has complained that Section 5 is too burdensome or that bailout is too restrictive. In fact, Travis County has intervened to defend Section 5's constitutionality.

2. *Congress amassed an extensive record demonstrating ongoing discrimination against minority voters in covered jurisdictions*

Before reauthorizing Section 5 in 2006, Congress conducted an extensive investigation into the operation and effect of the VRA over the previous 40 years. Congress held 21 separate hearings, heard from 86 witnesses, and gathered over 15,000 pages of evidence to discern the extent to which discrimination against minority voters continues in jurisdictions covered by Section 5. See H.R. Rep. No. 478, 109th Cong., 2d Sess. 5, 11 (2006) (*2006 House Report*); S. Rep. No. 295, 109th Cong., 2d Sess. 2-4, 10 (2006).

Cognizant that Section 5 had been in operation since 1965, Congress examined not only the degree to which discrimination against minority voters persists in covered jurisdictions, but also the extent to which Section 5 has already been effective at remedying, preventing, and deterring such discrimination. Although Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters" since 1965, Congress also determined that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the" Fifteenth Amendment, as evidenced by "second generation barriers constructed to prevent minority voters from fully participating in the electoral process." 2006 Reauthorization § 2(b)(1), (2) and (7), 120 Stat. 577-578; see *2006 House Report* 6. Those findings are entitled to substantial deference. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195-196 (1997).

In deciding whether to reauthorize Section 5 in 2006, Congress was not writing on a blank slate. Since Sec-

tion 5's enactment in 1965, Congress has repeatedly re-examined whether Section 5 is an effective and appropriate remedy, and this Court has upheld both its enactment and subsequent reauthorizations. In investigating whether minority voters in covered jurisdictions continued to face discrimination in 2006, Congress relied primarily on the same evidentiary sources on which Congress previously relied, and which this Court approved in *South Carolina* and *City of Rome*.

Because the VRA has been in operation for some time, there is no logic in appellant's insistence that reauthorization is proper only if the extent and types of voting discrimination that exist today exactly mirror the extent and types of voting discrimination that led to its enactment in 1965. In 2006, Congress was not deciding whether to enact Section 5 in the first instance, but whether to retain it. As the district court detailed, Congress found had before it evidence that Section 5 continues to be necessary and appropriate.

a. Section 5 enforcement

The strongest evidence of the continued need for Section 5 arises from the operation of the provision itself. In upholding Section 5 in *City of Rome*, this Court credited Congress's conclusion that "[t]he recent objections entered by the Attorney General * * * clearly bespeak the continuing need for this preclearance mechanism." 446 U.S. at 181 (quoting H.R. Rep. No. 196, 94th Cong. 1st Sess. 10 (1975) (*1975 House Report*)).

The 2006 record demonstrates that Section 5 continues to play an active role in preventing and deterring constitutional violations and maintaining the progress achieved over the past 40 years. The number of objections interposed by the Attorney General to prevent

discriminatory voting changes in covered jurisdictions has not dwindled, as one might expect had Section 5 outlived its usefulness. Since Section 5 was reauthorized in 1982, the Attorney General had interposed more than 750 objections, *2006 House Report* 21-22; *id.* at 36, and his objections prevented implementation of more than *2400 discriminatory voting changes*. See *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 104-2595 (2005) (*History, Scope, & Purpose*) (reproducing objections).[8] Although the annual rate of objections from 1968-1982 was slightly higher than the rate from 1982 to the present, *Continued Need* 172, the rate in several southern States actually *increased* in the post-1982 time period, *id.* at 60 (Louisiana); *id.* at 37 (2/3 of objections in Mississippi interposed after 1982). The record demonstrates that Section 5 continues to serve a critical role in achieving the still-elusive goal of eliminating racial discrimination in voting.

First, Section 5 *prevents* constitutional violations. Significantly, Congress learned that a sizeable portion of the Attorney General's objections were interposed because a jurisdiction had acted with a discriminatory purpose. Intentional discrimination against minority voters is exactly the type of action the Fourteenth and Fifteenth Amendments empowered Congress to prevent. Examples of intentional discrimination blocked by

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[8] The Department of Justice tracks the number of individual changes objected to in each objection letter. See *2006 House Report* 21-22; *id.* at 36; J.S. App. 82. A list of objections can be found at Civil Rights Div., U.S. Dep't of Justice, *About Section 5 of the Voting Rights Act* (last modified Jan. 2, 2008) <http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm>.

the Section 5 preclearance process run the gamut of voting changes and types of jurisdictions.

One example illustrates the point. In 2001, the Attorney General interposed an objection regarding Kilmichael, Mississippi, after the all-white incumbent town governance tried to cancel an election shortly after black citizens had become a majority. *History, Scope, & Purpose* 1616-1619. When the citizens of Kilmichael finally voted, they elected the town's first African-American mayor and three African-American aldermen. *2006 House Report* 37. Other examples are legion. See, *e.g.*, *History, Scope & Purpose* 830-833 (2000 objection to redistricting plan for Webster County, Georgia, school board undertaken to "intentionally decreas[e] the opportunity of minority voters to participate in the electoral process" after majority black board was elected); *id.* at 1606-1612 (1998 objection to redistricting plan for Grenada, Mississippi, adopted with "purpose to maintain and strengthen white control of a City on the verge of becoming majority black").

Sometimes, Section 5 objections worked in tandem with other remedial provisions of the VRA to prevent constitutional violations. One example involved Mississippi's dual registration system, under which citizens were required to register separately for different elections. The dual system was a relic of the State's 1890 constitutional convention and was adopted "for the purpose of disfranchising blacks." *Continued Need* 176. In 1987, a federal court found that the system violated Section 2 of the VRA because it was "adopted for a discriminatory purpose and had a discriminatory effect, accounting, in part, for the 25 percentage-point difference in the registration rates of blacks and whites." *Ibid.* But, after passage of the federal National Voter Registration

Act of 1993, 42 U.S.C. 1973gg *et seq.*, Mississippi reinstituted a dual registration system. The Department of Justice objected in 1997, "finding that the state's new dual system was racially discriminatory both in purpose and effect." *Continued Need* 368.

Section 5 suits by private individuals can also play a critical role in preventing constitutional violations. County officials in Waller County, Texas, had for decades worked to prevent students at the historically black Prairie View A&M University from voting. When two students decided to run for local office in 2004, the white district attorney threatened the predominantly black student body with felony prosecution if they voted —even though a federal court had upheld the students' right to vote in local elections. *Continued Need* 185; *United States* v. *Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978), aff'd, 439 U.S. 1105 (1979). The district attorney relented after the NAACP brought suit. Yet, only a month before the election, county officials drastically reduced early voting near campus—knowing that many students would be on spring break on election day and therefore needed to vote early. The county did not submit the change for preclearance, but the scheme was nonetheless derailed when the NAACP filed a Section 5 enforcement action. *Continued Need* 185-186.

Second, Section 5 effectively *deters* unconstitutional discrimination. *2006 House Report* 24 ("As important as the number of objections that have been interposed to protect minority voters against discriminatory changes, is the number of voting changes that have never gone forward as a result of Section 5."). Congress heard repeatedly that "Section 5 has a strong deterrent effect" that has prevented jurisdictions from implementing

or enacting discriminatory voting changes. *Continued Need* 34.

One tangible way in which Congress found that Section 5's deterrent effect can be observed is in the "administrative mechanism, known as a 'more information request'" (MIR). *2006 House Report* 40. In some instances, an MIR causes the jurisdiction to alter its proposed change after concluding "that the change would be objected to as violating the Act if it were not withdrawn." *Continued Need* 124; *History, Scope, & Purpose* 93-94. Since 1982, more than 205 voting changes have been withdrawn in response to such information requests. *2006 House Report* 41. A recent study of the efficacy of MIRs at deterring discriminatory voting practices concluded that MIRs were particularly effective during the period 1999-2005, deterring many times more changes than formal objections did. *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 221 (2006). The study found that the "largest impact of MIRs was in Texas." *Id.* at 220.

Third, Section 5 *safeguards* the progress minority voters have achieved since 1965. Even where the Attorney General made no explicit finding of discriminatory purpose, Section 5's preclearance process has prevented hundreds of voting changes that would have eroded that progress. In Texas, for example, Latinos reached one-third of the State's total population by 2001. The state legislative redistricting board proposed a redistricting plan for the State House of Representatives that would have minimized Latino voting strength by eliminating four existing majority-Latino districts, while adding only one such district. The Attorney General interposed

an objection to the proposed plan, and Latino voters in Texas accordingly maintained four majority districts and the opportunity to elect representatives of their choice. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 19 (2005) (*Impact & Effectiveness*); *History, Scope, & Purpose* 2518-2523.

Finally, Section 5's protection *is comprehensive*. The preclearance process prevents the implementation of discriminatory voting changes in every form and at every level of government. The Justice Department has interposed objections to a range of voting changes, including annexations, education requirements, election dates, polling locations, majority-vote requirements, statewide and local redistricting, staggered terms, and numbered posts. *History, Scope, & Purpose* 1696-2595 (objection letters, 1978 through mid-2003); *Continued Need* 335, 402-404. Those objections have prevented discriminatory changes affecting voting at all levels of government and touching every aspect of voters' participation in the democratic process. See, *e.g.*, *id.* at 62-66, 335.

When a Section 5 objection prevents implementation of a discriminatory voting change at the statewide level, it protects hundreds of thousands of minority voters. Since 1982, the Attorney General has interposed an objection to a statewide redistricting plan in every fully covered State, thereby preventing discrimination against millions of minority voters. J.S. App. 69. In Louisiana, for example, "since 1965, not one single Louisiana State House of Representatives redistricting plan[,] as initially submitted to the Justice Department

for review, has been precleared." *Impact & Effectiveness* 16.

b. Additional evidence of voter discrimination

In 2006, Congress also relied on evidence of ongoing discrimination derived from outside the Section 5 preclearance process, including efforts to enforce other provisions of the VRA, statistical data, and testimony about particular abuses. See *South Carolina*, 383 U.S. at 330 ("Congress obviously may avail itself of information from any probative source."). These are the same sources previous Congresses relied on enacting and reauthorizing Section 5. *1981 House Report* 7-8, 17-18, 20-21; *1975 House Report* 7, 12, 16-24; *1975 Senate Report* 13-15, 20-21, 25-31; *1965 Senate Report* 3-12. Section 5 cannot prevent every discriminatory voting practice in covered jurisdictions, because it applies only to electoral *changes* and often cannot reach the discretionary actions of officials such as individual poll workers. But such discrimination is nonetheless relevant to Congress's determination that there is an ongoing need for Section 5.

i. Section 8 of the VRA, 42 U.S.C. 1973f, permits the Attorney General to deploy federal observers to monitor elections in a particular "locale because racial tensions are high and efforts to discriminate may occur." *Continued Need* 124. The Attorney General certifies the need for such observers "only when there is a reasonable belief that minority citizens are at risk of being disenfranchised" by tactics such as "harassment and intimidation inside polling locations." *2006 House Report* 44. In each year between 1984 and 2000, the Justice Department sent out between 300 and 600 individual observers. *Continued Need* 13. In 2004, the Department dispatched nearly 2000 monitors to over 100 jurisdictions. See

Modern Enforcement of the Voting Rights Act: Hearing Before the Senate Judiciary Comm., 109th Cong., 2d Sess. 9 (2006). In many covered States, the rate of observer coverage since 1982 has met or exceeded the rate of observer coverage between 1965 and 1982. *Continued Need* 79-80. Congress learned of many forms of racial discrimination reported by observers, including discriminatory statements made by poll workers. *Id.* at 184.

Congress also found that "[e]vidence of continued discrimination includes * * * the continued filing of section 2 cases that originated in covered jurisdictions." 2006 Reauthorization § 2(b)(4)(C), 120 Stat. 577-578. Analysis of reported Section 2 cases reveals widespread judicial findings of serious voting discrimination against minority voters in covered jurisdictions. See, *e.g.*, *Continued Need* 14 (North Carolina), 340 (South Dakota); *id.* at 251, 283-287 (maps and table showing number of county-level voting practices altered as a result of Section 2 litigation in, *e.g.*, Alabama (275), Texas (274), Georgia (76), Mississippi (74), and North Carolina (56)); *History, Scope, & Purpose* 78 (Texas, North Carolina, Alabama).

One prominent example was the subject of this Court's decision only three Terms ago in *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399 (2006), which found that Texas adopted a congressional districting plan in 2003 bearing "the mark of intentional discrimination that could give rise to an equal protection violation" by purposefully diminishing the voting strength of a cohesive language minority community. *Id.* at 440. The Court found that the State's intentional splitting of that cohesive minority population "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that

was becoming increasingly politically active and cohesive," and that "the State took away the Latinos' opportunity" to elect their candidate of choice precisely "because Latinos were about to exercise it." *Id.* at 439-440.

Congress also continued to rely in 2006 on disparities in registration rates between minority and nonminority voters. When this Court upheld the 1975 reauthorization of Section 5 in *City of Rome*, it noted that, "largely as a result of" the VRA, registration of black voters "had improved dramatically since 1965." 446 U.S. at 180. Nevertheless, the Court credited Congress's conclusion that a significant disparity remained in at least some covered jurisdictions, including disparities of between 16 and 24 percentage points in Alabama, Louisiana, and North Carolina. *1975 House Report* 6; *1975 Senate Report* 13. Comparable disparities persisted in 2006, when Congress found gaps of between 11 and 31 points in registration and turn-out rates in Virginia, Texas, and Florida. *2006 House Report* 25, 29. In fact, as the district court found, when the statistics are adjusted to distinguish between "White Hispanic" and "White non-Hispanic" residents, the gaps are even more striking, showing that black registration rates continue to lag behind those of non-Hispanic whites in all but one covered State. J.S. App. 61.

Beyond the quantitative and statistical evidence, Congress also gathered thousands of pages of testimony and documents from citizens, advocates, and officials chronicling ongoing problems of vote suppression, voter intimidation, and vote dilution throughout covered jurisdictions. Further examples of vote suppression, far beyond what can be summarized here, included minority voters being threatened with arrest or prosecution for voting, *Continued Need* 3619-3620, 3979, poll workers

telling language minority voters that they should not be voting if they do not speak English, *id.* at 350, 3980, large-scale efforts to challenge minority voters' registration, *id.* at 93, and misinformation campaigns designed to prevent minority voters from getting to the polls, *id.* at 3548. Examples of vote dilution included techniques such as dilutive redistricting plans, discriminatory annexations, anti-single-shot rules, majority vote/run-off requirements, and at-large election systems. *Id.* at 20, 123.

The abundant evidence Congress collected demonstrated that discrimination remains a serious problem. *2006 House Report* 6. Congress also found that the progress made in combating that discrimination "is the direct result of the Voting Rights Act." 2006 Reauthorization § 2(b)(1), 120 Stat. 577. That progress was not, however, enough. Congress enacted Section 5 as part of an effort "to rid the country of racial discrimination in voting," *South Carolina*, 383 U.S. at 315, not "simply to reduce racial discrimination in voting to what some view as a tolerable level," 152 Cong. Rec. S7976 (daily ed. July 20, 2006) (Sen. Feingold). Congress determined that further enforcement of Section 5 is necessary because without its "protections, racial and language minority citizens will be deprived of the right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Reauthorization § 2(b)(9), 120 Stat. 578. After extremely careful review, a near-unanimous majority of the people's elected representatives—including those representing jurisdictions covered by Section 5—voted to reauthorize the law. That determination is entitled to "much deference" by this Court. *Boerne*, 521 U.S. at 536.

3. Appellant's efforts to minimize the legislative record are unavailing

a. The central theme of appellant's attack is a claim that only evidence of "gamesmanship"—*i.e.*, jurisdictions evading judicial enforcement by changing discriminatory tactics—could justify Section 5. Br. 39-40. But "gamesmanship" was not the sole focus of Congress in originally enacting Section 5, and it was certainly not the focus of this Court in upholding it. The Court recognized in *South Carolina* that it was the cumbersome nature of case-by-case adjudication that prompted Congress to adopt the preclearance requirement. 383 U.S. at 314, 327-328.

Of course, Section 5's preclearance mechanism removes the opportunity for covered jurisdictions to engage in gamesmanship. Jurisdictions must now demonstrate that new voting practices are not discriminatory *before* implementing them. Although Congress did find evidence of some covered jurisdictions' attempts to evade the nondiscrimination mandate of Section 5, J.S. App. 131, the lack of additional evidence of that kind simply demonstrates that Section 5 is doing its job.

In a similar vein, appellant argues (Br. 54) that, while case-by-case adjudication was inadequate when the VRA was first enacted, litigation under Section 2 is now faster and more effective than Section 5 preclearance. Those are determinations for Congress to make. The extensive record in 2006 documented why Section 5 is an appropriate measure to remedy and prevent voting discrimination in covered jurisdictions. The same problems with case-by-case adjudication that justified Section 5 in 1965, *South Carolina*, 383 U.S. at 314; *City of Rome*, 446 U.S. at 174, exist today. Congress is not limited to sitting back while discrimination occurs and then

relegating its victims to the costly and burdensome litigation remedies available under Section 2.

Specifically, the record before Congress documented three shortcomings of Section 2 litigation. First, Section 2 is purely an after-the-fact remedy, available only to challenge voting practices and procedures already in place. Section 2 actions can take years to litigate, during which time the challenged practice remains in place no matter how discriminatory it is. If a candidate is elected under what turns out to be an illegal voting scheme, that individual will nonetheless enjoy significant advantages of incumbency. *Impact & Effectiveness* 13-14; *Continued Need* 97. In some cases, an illegal voting practice must remain in effect for several election cycles before the plaintiff can gather enough evidence to demonstrate a discriminatory effect. *History, Scope, & Purpose* 92. By contrast, under Section 5, discriminatory voting practices are prevented through a system that takes at most several months. See *id.* at 101. Moreover, it can be very difficult for all involved—the jurisdiction, candidates, and voters—when courts undo elections *ex post*. The far better solution is to ensure elections protect voting rights before they take place.

Second, Section 2 places the burden of proof on minority plaintiffs to demonstrate discrimination, while Section 5 places the burden on jurisdictions to demonstrate that a proposed change will not have a discriminatory effect and was not animated by a discriminatory purpose. *History, Scope, & Purpose* 83; *Continued Need* 97. Jurisdictions are in a much better position than individual citizens to amass information about potential discrimination in voting procedures, without incurring undue expense.

Finally, Section 2 places a heavy financial burden on minority voters who challenge illegal election practices and schemes. See *History, Scope, & Purpose* 92, 97. Section 5, on the other hand, takes the financial burden off minority voters while placing the comparatively small financial burden associated with preclearance onto covered jurisdictions. See *id.* at 79.

The evidence presented to Congress demonstrated that compliance with Section 5 is not unduly burdensome. Congress was informed that preclearance through the Attorney General is "swift" and "streamlined." *Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 10, 182 (2006). This case bears that out. Appellant's average annual expenditure on Section 5 compliance, which was only $223, now approaches zero since it entered joint election agreements with Travis County. J.A. 270, 279.

b. Appellant offers two specific challenges to the evidence relied upon by Congress, deriding the rate of Section 5 objections as "vanishingly small," Br. 52, and questioning Congress's concern with the prevalence of racially polarized voting, *id.* at 48-49. Neither point undermines Congress's determination.

As the district court found, the rate of objections interposed by the Attorney General has always been low, and the overall trend throughout the life of Section 5 has been declining, as would be expected. J.S. App. 64-67. As noted earlier, however, the rate in several southern States actually *increased* in the post-1982 time period. See p. 43, *supra*. Moreover, statistics demonstrate a "consistent increase over time of objections based on the purpose prong of Section 5." Peyton McCrary et al., *The End of Preclearance As We Know It:*

How the Supreme Court Transformed Section 5 of the Voting Rights Act, 11 Mich. J. Race & Law 275, 297 (2006).[9] Most importantly, the rate of objections alone does not reflect the degree to which such objections prevent and deter discrimination against minority voters. See pp. 41-51, *supra*.

Appellant also dismisses (Br. 49-51) Congress's finding that persistent racially polarized voting throughout covered jurisdictions leaves minority voters "politically vulnerable," 2006 Reauthorization § 2(b)(3), 120 Stat. 577, arguing that racial polarization is not state action, and therefore not relevant to the Fifteenth Amendment. Section 5 prohibits covered governmental entities from implementing voting changes that discriminate against minority voters, including discriminatory voting schemes that inhibit minority voters' opportunity to elect their candidates of choice. As the district court found, racially polarized voting is a necessary precondition for vote dilution techniques to have their intended discriminatory effect. J.S. App. 106. Thus, Congress's finding that racial bloc voting continues throughout covered jurisdictions bolsters Congress's determination that covered jurisdictions have ready means of discriminating against minority voters.

C. Amici's Challenges To The 2006 Substantive Amendments To Section 5 Are Not Properly Before The Court

Appellant does not challenge, but notes in passing (Br. 63), that Congress amended Section 5's substantive standard to provide that election changes motivated by

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[9] The number of objections based on intent decreased following *Reno* v. *Bossier Parish School Board*, 528 U.S. 320, 341 (2000). In 2006, Congress amended Section 5 to provide for denial of preclearance for intentionally discriminatory measures.

a racially discriminatory purpose will preclude preclearance, even when the changes are not retrogressive. See 42 U.S.C. 1973c(a) and (c). That change overruled this Court's statutory holding in *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*), that changes motivated by discrimination, even though unconstitutional, were not a basis for denying preclearance. *Id.* at 341.[10]

Certain of appellant's amici take, as the focus of their attacks on the 2006 reauthorization, that substantive change and another, by which Congress provided that preclearance should be denied if an electoral change diminishes, on account of race, citizens' ability "to elect their preferred candidates of choice," 42 U.S.C. 1973c(b). See, *e.g.*, Thernstrom Br. 2-4; Scarf-Norton Br. 7. Amici's arguments, which rest on the premise that the substantive amendments will lead Section 5 to be applied in an unconstitutional manner, are not properly before the Court. They were neither pressed before nor passed upon by the district court, nor were they raised in appellant's jurisdictional statement.

Any challenge to the substantive amendments is, in any event, premature. Such a challenge must await a case involving the Department's application of the new provisions. To be clear, however, amici are incorrect that the amended Section 5 authorizes—let alone compels—either the Justice Department to require, or covered jurisdictions to engage in, unconstitutional redis-

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[10] The statutory change with respect to *Bossier II* makes Section 5 hew even more closely to the constitutional prohibition it enforces. Under *Bossier II*, an unconstitutional discriminatory motive was not a basis to refuse to preclear an election change. Section 5 now stands as protection against that type of constitutional violation as well.

tricting.[11] No act of Congress could "overrule" this Court's determinations of what the Constitution requires in the redistricting context, and the Department's guidance makes that clear.[12]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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[11] Appellant does not, in any event, engage in redistricting.

[12] *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c*, 66 Fed. Reg. 5413 (2001).

APPELLEE'S BRIEF

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No. 08-322

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CORRECTED COPY

BRIEF FOR INTERVENORS-APPELLEES RODNEY AND NICOLE LOUIS, *ET AL.*; LISA AND DAVID DIAZ, *ET AL.*; ANGIE GARCIA, *ET AL.*; AND PEOPLE FOR THE AMERICAN WAY

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QUESTIONS PRESENTED

1. Whether a municipal utility district that does not register voters is a "political subdivision" eligible to invoke the bailout provision in Section 4(a) of the Voting Rights Act when the Act's plain language limits such "political subdivision[s]" to counties, parishes, and entities "which conduct[ ] registration for voting."

2. Whether Congress acted within the scope of its enforcement powers under the Fourteenth and Fifteenth Amendments when, in light of an extensive legislative record of persistent unconstitutional discrimination against minority voters in covered jurisdictions and compelling evidence that a failure to renew Section 5 would result in backsliding of the progress that has been made, Congress reauthorized Section 5 of the Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Intervenors-Appellees, NAACP Legal Defense and Educational Fund, Inc., Mexican American Legal Defense and Educational Fund, Inc., Texas RioGrande Legal Aid, Inc., and People for the American Way Foundation, certify that each are non-profit corporations with no parent companies, subsidiaries or affiliates that have issued shares to the public.

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SUMMARY OF ARGUMENT

No statute in our history embodies America's commitment to democracy more clearly than the Voting Rights Act. Since 1965, Congress and five Presidents have acted to create or preserve this statutory framework designed to prevent racially discriminatory barriers that deny or abridge our citizens' right to vote.

This case is the latest in a line of challenges to the Act's constitutionality. All have been rejected by the Court. The foundation of this Appellant's attack is the contention that the country no longer needs Section 5, the heart of the Voting Rights Act, to be the inclusive democracy that we strive to become, and that racial discrimination no longer poses a significant threat to that aspiration. This argument cannot be reconciled with the evidence.

While there has certainly been progress, as a plurality of this Court noted just last week: "[s]till, racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions. . . ." *Bartlett v. Strickland,* 556 U.S. ___ (2009), slip op. at 21 (Kennedy, J.). In 2006, Congress too observed measurable progress in our nation's efforts to ameliorate voting discrimination, but found substantial continuing intentional discrimination. After careful review of a record exceeding 15,000 pages, Congress determined that condoning racial discrimination in voting, with knowledge of its

persistence and effects, erodes our Constitution's promise of full citizenship.

Precedent does not support Appellant's attempt to substitute its judgment for that of Congress. This Court's decisions from *South Carolina v. Katzenbach* to *City of Boerne v. Flores* and its progeny leave no doubt that Section 5 remains constitutional. Specifically, this Court has already determined that, faced with ongoing discrimination against minority voters, Congress can, consistent with the Constitution, adopt the Section 5 prophylaxis, and any remaining question about whether Congress should have reauthorized the remedy is properly regarded as legislative and not constitutional in nature.[1]

ARGUMENT

Resolution of Appellant's constitutional challenge turns in large part on the gravity of the harm Congress addressed through Section 5. *See, e.g., City of Boerne v. Flores,* 521 U.S. 507, 529-31 (1997); *Tennessee v. Lane*, 541 U.S. 509, 523 (2004). This brief speaks to that question.

After an overview of the Voting Rights Act ("VRA or Act") of 1965 and the first three reauthorizations, we discuss the extensive record before Congress in 2006. *See* Part I. A-B, *infra.* That record revealed

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[1] We adopt the Intervenors-Appellees NAACP, *et al.*'s arguments concerning bailout and the deferential review that guides consideration of the 2006 reauthorization. In this brief, we show that Section 5 easily satisfies *Boerne*'s congruence-and-proportionality framework.

invidious and persistent discrimination in the covered jurisdictions, as well as Section 5's imperative role in turning the promise of inclusive democracy into a reality. Far from working a substantive redefinition of constitutional rights, Section 5 is well within Congress's authority to remedy and deter core violations of the Fourteenth and Fifteenth Amendments. In these circumstances, application of this Court's precedents is straightforward, and Appellant's invitation for this Court to second-guess Congress's weighing of the evidence should be rejected. *See* Part II, *infra*.

I. THE VOTING RIGHTS ACT: 1965 TO 2006

A. The Voting Rights Act was Enacted and Reauthorized in the Face of Widespread Discrimination

The abrupt end of Reconstruction in 1877 offers a bitter lesson about the consequences of failed political will to sustain comprehensive voting rights for minority voters. Following the demise of Reconstruction, States and localities in the Old Confederacy engaged in decades of "unremitting and ingenious defiance of the Constitution," by promulgating numerous measures designed either to prevent Blacks from voting, or to cancel out the effect of the Black vote. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). Those schemes reduced minority participation to insignificance. It was eighty years before Congress responded with legislation. Beginning in 1957, Congress enacted three statutes designed to facilitate case-by-case voting litigation, but these "new laws [did] little to

cure the problem of voting discrimination." *Id.* at 313. This case-by-case method was ineffective because voting suits are "unusually onerous to prepare," litigation is "exceedingly slow," and, following favorable judicial decisions, some jurisdictions enacted new "discriminatory devices not covered by the federal decrees." *Id.* at 314.

March 7, 1965 marked the beginning of the end for this piecemeal approach. That day, millions of Americans had their television programs interrupted with images of Alabama law enforcement officers brutally assaulting Black men, women, and children on the Edmund Pettus Bridge in Selma, Alabama. The demonstrators were peacefully protesting a state trooper's killing of a young Black man during a voter registration event. *See* David J. Garrow, *Protests at Selma* 61-62 (1978). A week later, President Johnson delivered a speech before a special joint session of Congress. He began:

> I speak tonight for the dignity of man and the destiny of Democracy. I urge every member of both parties, Americans of all religions and of all colors, from every section of this country, to join me in that. At times, history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.

President Johnson described the now infamous tactics employed to prevent Blacks from voting in the

South, and shared his first-hand experience witnessing discrimination against Mexican Americans in Texas. He urged the passage of a new voting rights act, but recognized: "even if we pass this bill the battle will not be over."[2]

Congress responded by enacting the Voting Rights Act of 1965, a milestone in "the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett*, 556 U.S. ___, slip op. at 6.

Section 5 lies at the heart of the Act. *See Katzenbach*, 383 U.S. at 315. It requires covered States and political subdivisions to obtain preclearance of voting-related changes from either the Department of Justice (DOJ) or a three-judge panel of the United States District Court for the District of Columbia. 42 U.S.C. § 1973c(a) (2006). Preclearance will be granted as long as the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. . . ." *Id.* The statute's purpose prong prevents the implementation of voting-related changes that were motivated by intent to discriminate against minority citizens. *See id.* §1973c(c).[3] The effect prong prevents retrogression:

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[2] President Lyndon B. Johnson, Address to Congress on the Voting Rights Act: We Shall Overcome (Mar. 15, 1965), *available at* www.historyplace.com/speeches/johnson.htm.

[3] This purpose standard was used by DOJ to evaluate preclearance submissions between 1965 and 2000, but was rejected in favor of a retrogressive purpose standard by this

it ensures that minority voters are no worse off under the new law or practice compared to the previous (benchmark) one. *See Beer v. United States*, 425 U.S. 130, 141 (1976).

Like several other parts of the VRA, Section 5 has a sunset provision. In 1970 and 1975, Congress reauthorized Section 5 for five and seven years, respectively, after reviewing evidence that, while the Act had led to significant progress, discrimination against minority voters persisted in the covered jurisdictions. *See, e.g.*, S. Rep. No. 94-295, at 13-15 (1975). In addition, in 1975, the record before Congress documented numerous examples of racial discrimination in voting against Latinos, Asian Americans, American Indians, and Alaska Natives. *Id.* at 25-27, 31. In Texas, for example, Mexican Americans suffered discrimination "in ways similar to the myriad forms of discrimination practiced[ ] against blacks in the South." *Id.* at 25. Congress extended Section 5's protections to these voters, and also altered the coverage formula, which led to Texas's inclusion as a covered State.

In 1982, Congress again learned that discrimination in the covered jurisdictions persisted. H.R. Rep. No. 97-227, at 19 (1981); S. Rep. No. 97-417, at 12-14 (1982). A large bipartisan majority of Congress reauthorized Section 5 for 25 years, and

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Court in *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000) ("*Bossier II*"). In the 2006 reauthorization, Congress restored the pre-*Bossier II* definition of the purpose prong. *See* 42 U.S.C. § 1973c(c).

President Reagan signed the reauthorization into law. Pub. L. No. 97-205 § 2(b)(8) (1982).

B. Congress Carefully Examined the Evidence During the 2006 Reauthorization Process and Determined that Section 5 Remains Necessary

In determining whether Section 5 was still needed to remedy and deter unconstitutional discrimination against minority voters in 2006, Congress approached its task with great care. The House and Senate Judiciary Committees held a combined 21 hearings over 10 months, receiving testimony from over 90 witnesses—including state and federal officials, litigators, scholars, and private citizens—both for and against reauthorization.[4] Throughout the process, the record was "open and available for all groups of all opinions" to present their views to Congress. *May 4, 2006 Hearing*, at 70.

Congress deliberated "long and hard over months and months of internal debate." *Id.* at 74. Representative James Sensenbrenner, then-Chair of the House Judiciary Committee, explained that the 2006 reauthorization of the VRA was based on "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 1/2 years that I have been honored to

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[4] *See* H.R. Rep. No. 109-478, at 5 (2006); 152 Cong. Rec. S7967-S7968 (daily ed., July 20, 2006). Hearings were held by the House and Senate Judiciary Committees between October 18, 2005 and July 13, 2006. Specific hearings are cited herein by date.

serve as a Member of this body." 152 Cong. Rec. H5143-02 (daily ed. July 13, 2006).

After this careful review, Congress found that significant progress has been made in combating discrimination against minority voters. Pub. L. No. 109-246 § 2(b)(1) (2006). However, "[d]espite [this] progress, the evidence before Congress reveals that 40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution." *Id.* § 2(b)(7).

In light of the foregoing, Congress concluded—by a 390-33 vote in the House and a 98-0 vote in the Senate[5]—that certain temporary provisions of the VRA were no longer needed,[6] and that Section 5 was among those provisions still necessary to prevent minority citizens from being "deprived of the opportunity to exercise their right to vote, or [having] their votes diluted, undermining the significant gains made by minorities in the last 40 years." *Id.* § 2(b)(9). Accordingly, Congress passed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006, which extended Section 5 for 25 years, and which further committed Congress to reconsider the need for this remedy in 15 years. *See* 42 U.S.C. § 1973b(a)(7), (8).

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[5] *See* 152 Cong. Rec. H5143-H5207 (daily ed. July 13, 2006).

[6] *See* H.R. Rep. No. 109-478, at 61-62 (repealing provisions relating to federal examiners).

The factual findings underlying Congress's decision to reauthorize Section 5 are unassailable. The record demonstrates that, while minority voters have made significant progress, unconstitutional discrimination remains all too common. Since 1982, there have been well over one thousand discriminatory electoral practices in the covered jurisdictions that were blocked by either Section 5 or Section 2 of the VRA, hundreds of which clearly involved intentional discrimination.

Under Section 5, DOJ interposed over 620 objections between 1982 and the 2006 reauthorization. J.S.App. 66. Appellant claims that the vast majority of Section 5 objections "do not signify the purposeful discrimination required for a constitutional violation." Br. at 63. But the evidence before Congress showed the opposite: 60% of all objections between 1980 and 2000 were based, at least in part, on purposeful (and thus unconstitutional) discrimination. *November 1, 2005 Hearing*, at 180-81.[7]

Yet, even this powerful remedy does not completely block abridgments of the right to vote. In

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[7] Similarly, amicus Scharf-Norton Center's speculation about the number of objections based on DOJ enforcing an impermissible maximization approach, *see* Br. at 10-12 (discussing *Miller v. Johnson*, 515 U.S. 900, 927 (1995)), is divorced from the actual record. A review of the objection letters reveals that a very small number of objections (almost exclusively from the early 1990s) were even arguably based on a maximization theory. *See October 25, 2005 (History) Hearing*, at 225-2595 (copies of post-1982 objections).

the nine States fully covered by Section 5, plaintiffs also brought 653 successful Section 2 lawsuits between 1982 and 2006 (a number that includes settled cases). *See* App. Br. at 48. Although Section 2 does not require a finding of purposeful discrimination, much of the evidence offered in Section 2 cases is also probative of unconstitutional conduct. *Compare Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986) *with Rogers v. Lodge*, 458 U.S. 613, 616-28 (1982). Moreover, because of this statutory remedy, courts need not reach constitutional questions in most voting rights cases. *See, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 442 (2006) ("*LULAC*").

Therefore, Congress reasonably concluded that, in the covered jurisdictions, the hundreds of successful Section 2 suits evidenced the ongoing need for remedial legislation. *See* Pub. L. No. 109-246 §2(b)(4)(C), (8). Notwithstanding Appellant's conclusory assertion to the contrary, (Br. at 48), however, Congress also reasonably found that "case-by-case enforcement" through "Section 2 would be ineffective to protect the rights of minority voters[.]" H.R. Rep. No. 109-478, at 57. Congress learned that Section 2 suits are among the most complex and resource intensive of all actions brought in federal court, taking an average of at least two to five years with costs running into the millions of dollars. *See, e.g., May 10, 2006 Hearing*, at 96; *May 9, 2006 Hearing*, at 141; *May 17, 2006 Hearing*, at 20, 80. Moreover, Section 2 allows the discriminatory practice to go into effect (often for several election cycles), and candidates who win election under a discriminatory plan gain the substantial advantages

of incumbency. *See October 18, 2005 Hearing*, at 13; 43-44; *May 16, 2006 Hearing*, at 6. Finally, Congress learned that minority voters at the local level (especially in rural communities) generally lack access to the resources and expertise necessary for successful Section 2 litigation. *October 25, 2005 (History) Hearing*, at 84.

In addition to Section 5 objection letters and Section 2 litigation, Congress studied several other probative categories of evidence, which are discussed in detail by the District Court. These include: over 100 successful Section 5 enforcement actions to compel the submission of voting changes that jurisdictions never submitted for preclearance; over 200 voting changes withdrawn in response to DOJ letters requesting more information about a proposed voting change (MIRs); more than two dozen denied or withdrawn requests for judicial preclearance; and evidence of discrimination documented by the over 300 federal election observers assigned by the Attorney General each year since 1982 based on "a reasonable belief that minority citizens are at risk of being disenfranchised," through, *inter alia*, "harassment and intimidation inside polling locations," H. R. Rep. No. 109-478, at 44. *See* J.S.App. 84-93.

And, as the District Court also explained, in addition to these quantitative measures of ongoing discrimination, Congress received compelling evidence that "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes," H.R. Rep. No. 109-478, at 24. *See* J.S.App. 108-12.

The District Court canvassed numerous specific examples of intentional discrimination against minority voters. *See, e.g.*, J.S.App. 155-83. But that by no means exhausted the evidence presented to Congress. There are hundreds of additional examples that the District Court did not discuss in its thorough opinion.

Below we provide a sample of the record evidence of discrimination in the covered jurisdictions since 1982, drawn primarily from Section 5 objection letters. Most of these examples are not included in the District Court's opinion. An Addendum to this brief references over one hundred Section 5 objection letters cited herein,[8] the vast majority of which are based at least in part on discriminatory purpose (hereinafter discriminatory-purpose objections).[9]

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[8] Pursuant to Rule 32(3), we have submitted a request to lodge these objection letters with the Court. The letters are also available at http://naacpldf.org/Sec5.pdf.

[9] Section 5 places the burden of proof on the covered jurisdiction. A review of all of the objection letters since 1982, however, reveals almost no discriminatory-purpose objections that were interposed because DOJ lacked evidence about the jurisdiction's motive or because that evidence was in equipoise. *See October 25, 2005 (History) Hearing*, at 225-255. In each objection letter we discuss, DOJ conducted a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," as required by *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), in cases where the burden of establishing purposeful racial discrimination is on the plaintiff. Specifically, these discriminatory-purpose objection letters include one or more of the following circumstances probative of intentional discrimination under *Arlington Heights*: (1) a pattern of

Three important themes emerge from this summary. First, despite unquestionable progress since 1965, voting discrimination in covered jurisdictions has proven a persistent threat to the rights guaranteed by the Fourteenth and Fifteenth Amendments. As was the case in prior reauthorizations, *see, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 180-181 (1980), Congress learned in 2006 that gains in minority registration often lead to the use of sophisticated forms of purposeful discrimination designed to cancel out minority voting strength. *See generally Allen v. State Bd. of Elections,* 393 U.S. 544, 565 (1969) (recognizing that "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."). Notably, numerous jurisdictions have enacted multiple discriminatory voting laws since 1982.

Second, the scope of discrimination against minority voters is illustrated not only by the large number of examples, but also by the circumstances surrounding each individual act. Many incidents of discrimination that appear localized actually involve intentionally discriminatory actions taken by both local officials and the State. Moreover, a single objection or MIR can deter numerous discriminatory

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decisionmaking inexplicable on race-neutral grounds; (2) contemporary records of decisionmakers' views; (3) departures from normal procedural or substantive practices; and (4) the historical background and specific sequence of events leading up to a voting change. *See id.* at 266-67.

voting regulations. *See, e.g.*, October 18, 2005 Hearing, at 1250.

Third, as this Court noted in a recent case arising from Texas, minority voters are often the most likely to face discrimination when they are gaining numerical strength and on the verge of exercising newfound political power. *See LULAC*, 548 U.S. at 440 ("In essence, the State took away [Latinos'] opportunity [to elect a candidate of choice] because they were about to exercise it.").

The experience in Texas, where Appellant is located, is a microcosm of the discrimination common in covered jurisdictions. We begin there.

1. Substantial Voting Discrimination Persists in Texas

As this Court observed in 2006:

> Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. . . . The history of official discrimination in the Texas election process—stretching back to Reconstruction—led to the inclusion of the State as a covered jurisdiction under Section 5 in the 1975 Amendments to the Voting Rights Act.

LULAC, 548 U.S. at 439-440 (quoting with approval lower court opinion).

Although there has been progress since 1975, the promise of the Fifteenth Amendment has not been

realized. While the overall rate of DOJ objections may be relatively small, (*See* App. Br. at 52), the quantity and nature of objections in Texas alone establishes that minority voters continue to face persistent intentional discrimination in exercising their fundamental right to vote.

Between the 1982 reauthorization and 2004, DOJ interposed 105 objections to discriminatory voting changes in Texas—ten of which were statewide. *See* J.S.App. 68, 71. At the local level, Section 5 objections prevented the implementation of discriminatory electoral changes in 72 Texas counties where over two-thirds of the State's minority population resides. Dkt. No. 100-12, Ex. 8 ("Texas Report"), at 22-23. Twenty-eight counties, utilizing various strategies to obstruct minority participation, have drawn multiple Section 5 objections in this period. *Id.* Furthermore, an additional 60 submissions from Texas jurisdictions were either withdrawn in response to an MIR or denied judicial preclearance, and Texas plaintiffs also brought 29 successful Section 5 enforcement actions. *See* J.S.App. 87, 90. In addition to all of this activity under Section 5, between 1982 and 2004, more than 150 Section 2 suits were resolved on behalf of minority voters in Texas, leading 142 jurisdictions to alter discriminatory voting practices. Texas Report, at 34.[10]

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[10] We note that, notwithstanding the assertions of several amici, *see, e.g.*, Southeastern Legal Foundation Amicus Br. at 28, a majority of successful suits in the study of Section 2 cases presented to Congress originated in the covered jurisdictions.

The examples underlying these statistics shed light on the nature of recent voting discrimination at both the state and local level.

Texas's redistricting plans for its House of Representatives have drawn Section 5 objections after each decennial census since the State was covered in 1975. *October 25, 2005 Hearing*, at 2177-80, 2319-23, 2518-23. In the most recent of those objections (2001), DOJ found the State's redistricting plan retrogressive because it eliminated three Latino-majority districts. Moreover, the plan fragmented Latino voters in a manner that "deviates from the State's traditional redistricting principles[.]" *Id.* at 2521. Following the 1990 Census, DOJ likewise determined that, not only was Texas's state house redistricting retrogressive, lawmakers deliberately packed or fragmented residentially compact Latino populations to minimize the number of Latino-majority districts. *See id.* at 2321-22.

Similarly, this Court concluded that Texas's 2003 congressional redistricting plan violated Section 2, and noted that it "bears the mark of intentional

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October 18, 2005 Hearing, at 974. (Amici's contrary understanding is based on one confusing sentence in the study. *See id.*). Indeed, that study found that plaintiffs in covered jurisdictions have a notably higher rate of success in Section 2 suits than do plaintiffs in non-covered jurisdictions. *Id.*; *see also May 9, 2006 Hearing*, at 44; Ellen Katz, *Final Report of the Voting Rights Initiative*, 39 U. Mich. J. L. Reform 639, 655-56 (2006). These differences between the covered and non-covered jurisdictions are particularly noteworthy given that the Section 5 prophylaxis deters a substantial amount of discrimination in the covered jurisdictions.

discrimination [against Latino voters] that could give rise to an equal protection violation." *LULAC*, 548 U.S. at 440. Because of the slower pace of the Section 2 remedy, however, the 2004 congressional elections had already taken place under the illegal plan. Even after this Court's decision, Latino voters were forced to bring a successful Section 5 enforcement action when state officials, without requesting preclearance, attempted to curtail early voting in the special election held in the remedial district. *See LULAC v. Texas*, No. 06-1046 (W.D. Tex. Dec.1, 2006).

An example of entrenched resistance to minority voting rights at the local level involves the extraordinary efforts by county officials in Waller County, over three decades, to prevent students at the historically Black Prairie View A & M University from voting. Litigation from the late 1970s—including a decision from this Court—established that Prairie View A & M students had a right to vote in county elections. Nonetheless, in the 1990s and 2000s, local officials indicted students, or threatened them with prosecution, for voting in such elections. J.S.App. 90, 92; *March 8, 2006 Hearing*, at 185-86. Then, in 2004, the county commissioners' court, aware that students would be on break the day of the primary election, voted to reduce early voting dramatically, and did not submit this change for Section 5 preclearance.[11] The county only abandoned this newest effort to suppress Black turnout when

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[11] This very same commissioners' court had drawn a Section 5 objection in 2002 for enacting a retrogressive redistricting plan. *October 25, 2005 (History) Hearing*, at 2524-27.

the university chapter of the NAACP brought a Section 5 enforcement action. *See* J.S.App. 92; *March 8, 2006 Hearing*, at 185-86. Given this record, Appellant's claim that voting discrimination in Waller County was a "one-off" occurrence, (Br. at 46), is untenable.

The City of Seguin was similarly creative in attempting to thwart minority participation, but, contrary to Appellant's suggestion, (Br. at 54-55), Section 5 played a critical remedial role. Between 1978 and 1993, Latino plaintiffs filed three separate successful lawsuits, using Section 5, Section 2, and the Equal Protection Clause, to challenge Seguin's malapportioned, multi-member, or otherwise dilutive districting plans.[12] *See* Texas Report, at 36-37. A 1993 settlement led to the creation of eight single-member districts. *Id.* at 29. Then, after the 2000 census revealed that Latinos had become a majority in five of the eight city council districts, Seguin

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[12] In jurisdictions with racially polarized voting, at-large elections or multi-member districts tend to minimize the voting strength of minority groups by permitting the majority to elect all of the representatives. *See, e.g., Rogers*, 458 U.S. at 616.

In 2006, Congress learned that racially polarized voting is more severe in covered than in non-covered jurisdictions, and that racial appeals (e.g., a candidate emphasizing the race of his opponent by publishing his opponent's picture, sometimes darkened, in his campaign literature) are more common in covered than non-covered jurisdictions—indeed, the evidence before Congress showed that racial appeals are still routinely employed in biracial elections in some covered jurisdictions. *See, e.g., October 20, 2005*, at 84-85; *May 9, 2006 Hearing*, at 44; *May 17, 2006 Hearing*, at 17.

blocked Latinos from electing a majority of council members by dismantling a Latino-majority district. After the Attorney General indicated that preclearance was unlikely, Seguin withdrew its proposal but promptly closed the candidate filing period to prevent any Latino candidate from competing in the district. Seguin did not submit this change for preclearance, but a successful Section 5 enforcement suit caused the city to reopen its candidate filing period. *See* J.S.App. 92-93.

Three other recent examples from Texas illustrate the need for both Section 5 and Section 2. Until 1990, Freeport elected its four-member city council in at-large elections by plurality vote. That year, the first and only Latino-preferred candidate was elected by a slim plurality, and the city responded by enacting a majority-vote requirement. *October 25, 2005 Hearing*, at 2291-92; 2528-30.[13] DOJ objected, finding that the change was retrogressive. *Id.* at 2292. Shortly thereafter, the city settled a separate Section 2 case by agreeing to adopt single-member districts; over the next decade, Latino voters were able to elect candidates of choice in two out of four

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[13] Devices such as majority-vote requirements (which often result in run-off elections and prevent a plurality of voters from electing a candidate of choice); numbered posts (which require head-to-head contests for each seat); and anti-single-shot voting prohibitions (which prevent minority voters from concentrating their votes on a single candidate in multiple-candidate elections) enhance the tendency for multimember or at-large districts to minimize the voting strength of minorities. *See, e.g.*, *Thornburg*, 478 U.S. at 37; *Rogers*, 458 U.S. at 616-17; *White v. Regester*, 412 U.S. 755, 766-67 (1973).

council districts. *Id.* at 2528-30. In 2002, however, Freeport drew a retrogression objection for attempting to reinstitute at-large elections. *Id.*

Similarly, in 2001, the Haskell Consolidated Independent School District, which encompasses Haskell, Knox, and Throckmorton Counties, attempted to return to at-large elections after having settled, just seven years earlier, a Section 2 suit by agreeing to implement single-member districts. *October 25, 2005 Hearing*, at 2513-17. In interposing an objection, DOJ explained that the data did not support the race-neutral reason proffered by the district for the retrogressive plan (that voter turnout was higher under an at-large system). *See id.* at 2515. Furthermore, DOJ rejected the district's suggestion that the minority community should wait until after the new system took effect to challenge it, because that proposition "ignored the essential purpose of Section 5, which is to ensure that gains achieved by minority voters not be subverted by retrogressive changes." *Id.*

DOJ objected to Bailey County's 1991 retrogressive redistricting plan, and interposed a second objection the following year, when the county held a special election using the objected-to district boundaries. *See id.* at 2362-63, 2409. Then, in July 1993, the county drew a third objection when it attempted to evade a settlement in a separate voting suit by reducing the number of justice of the peace and constable districts from four to one. *See id.* at 2416-18.

Faced with this evidence, Congress's assessment of the important and continuing interplay between Sections 5 and 2 was well-founded.

Other types of examples abound. While Appellant argues that moving a polling place is a "minute and obviously benign change[ ]," (Br. at 14), this Court has recognized that the selection of a polling place affects whether "[t]he abstract right to vote . . . becomes a reality at the polling place on election day." *Perkins v. Matthews,* 400 U.S. 379, 387 (1971). Three examples from Texas prove the point.

In 2006, the North Harris Montgomery Community College District, which comprises two counties and an area of more than 1,000 miles, proposed to reduce the number of polling sites from 84 to 12. *May 16, 2006 Hearing*, at 60-61. Objecting to these reductions as retrogressive, DOJ explained that the site with the smallest proportion of minority voters would serve 6,500 voters, while the site with the largest proportion of minority voters (which was 79.2% Black and Hispanic) would serve over 67,000 voters. *Id.*

In 1994, Marion County drew an objection when it provided pretextual reasons for relocating a polling place to a venue that was less accessible for Black residents; the county was apparently motivated, at least in part, by a desire to thwart recent Black political participation. J.S.App. 178-79.

And, in 1991, a water district in Lubbock County enacted polling place changes that required voters in predominately African-American neighborhoods to travel to remote venues, while their counterparts in predominately white neighborhoods were assigned to

centrally located polling places. The district presented implausible nonracial reasons for the change, which was promulgated shortly after a settlement in a Section 2 suit forced the district to abandon at-large elections. *See October 25, 2005 Hearing*, at 2300-03; J.S.App. 72-73.

The evidence before Congress also revealed other types of discrimination designed to suppress minority turnout in Texas. For example, hearings conducted by the NAACP after the 2000 and 2002 elections documented various forms of intimidation and misinformation against Black voters. *March 8, 2006 Hearing*, at 138-39. In one particularly horrendous example, in 2000, a campaign worker for the first Black candidate to make the general election ballot in over 100 years in Wharton County (which has drawn six Section 5 objections since 1982) had her home set on fire, and a burnt picture of the Black candidate thrown on her property, after receiving calls about what would happen to her if she did not remove "the N-word sign out of her yard." *Id.*; *see also id.* at 2998-3002; *October 25, 2005 (History) Hearing*, at 216-17. Local law enforcement officers did little to investigate this election-related incident except requiring the victim to take a polygraph. *See March 8, 2006 Hearing*, at 3000-05. *See also* J.S.App. 104-05 (documenting additional polling-place discrimination against Black and Latino voters in Texas).

This type of discrimination is particularly significant given that, as Appellant concedes, Texas continues to suffer the greatest registration disparity between Anglos and Hispanics of all the wholly covered States. Br. at 50 (observing 16-point

difference between Anglos and Hispanics; also noting 5-point difference between Anglos and Blacks).

The adoption of discriminatory annexations, methods of election, and redistricting plans has also been common in Texas. DOJ interposed discriminatory-purpose objections in 1999 and 1997 respectively to racially selective annexations—i.e., purposeful efforts to use annexations to increase the white percentage of the population—by the cities of Lamesa (its second Section 5 objection in six years) and Webster. *See October 25, 2005 (History) Hearing*, at 216; 2505-07; J.S.App. 176-78. In 1994, an independent school district in Limestone County drew a discriminatory-purpose objection when it adopted a new method of election that appeared calculated to minimize Black voting strength; the district had disregarded the plan unanimously recommended by a fifteen member tri-racial study committee and provided pretextual reasons for the plan it selected. *See October 25, 2005 (History) Hearing*, at 2437-40. Other examples of purposefully discriminatory methods of election remedied by either Section 2 or Section 5 occurred in: Refugio County (1991); Dallas (1990); Frio and Medina Counties (1988); Colorado and Austin Counties (1988); Midland (1986); and Terrell (1983). *See id.* at 2304-06; 2247-48, 2249-50; J.S.App. 100-102.

In 1992, Galveston and Terrell Counties each drew objections to their purposefully discriminatory redistricting plans. Galveston County provided pretextual reasons for a plan that fragmented minority voters across multiple districts, *see October 25, 2005 (History) Hearing*, at 2344-45, while Terrell County (which had drawn a separate method-of-

election objection just six years earlier) provided no plausible nonracial explanation for adopting a plan that diminished Latinos' voting strength even though the Latino-share of the county's population had increased from 43% to 53%, *see id.* at 2359-60.

Similarly, in 1994, DOJ interposed an objection to an apportionment plan by the Gonzales County Underground Water Conservation District. The district avoided creating any districts where minority voters would have an opportunity to elect candidates of choice through "gross[ ] malapportion[ment]"—one district with nearly half the minority population was more than two-and-a-half times the size of any other district. *See id.* at 2458. Notably, this objection, like several others interposed between 1982 and 2004, was aimed at a small utility district—evidence that political subunits similar in size to Appellant implement discriminatory voting changes.

Simply put, the record before Congress demonstrates that, notwithstanding progress, intentional discrimination against minority voters remains a widespread and persistent problem in Texas.

But for Section 5, the vast majority of the incidents described in this section would have come out differently, and, as a result, the ability of African Americans and Latinos to participate in our democracy would have been severely impaired.

2. Substantial Voting Discrimination Persists in Other Covered Jurisdictions

Texas is not an anomaly.[14] The evidence before Congress showed ongoing discrimination against minority voters throughout the covered jurisdictions. As noted, when Congress considered the need for Section 5 in 2006, there had been over 600 Section 5 objections, over 600 successful Section 2 suits, over 200 submissions withdrawn due to MIRs, and over 100 Section 5 enforcement suits since the previous reauthorization. In nine of the wholly or partially covered States, more objections were interposed since the 1982 reauthorization than between 1965 and 1982. J.S.App. 66-68. And "as in 1975, the legislative record reveals that the Attorney General interposed objections to a wide variety of electoral changes proposed by governments at all levels." *Id.* at 69. Between 1982 and 2004, each fully covered State drew at least two statewide objections, with most fully covered States drawing many more. *See id.* at 71. At the local level, objections were particularly numerous in areas with large minority populations. *See id.* at 72, 74-75.

In the following pages, we discuss representative examples of discrimination against minority voters in covered jurisdictions outside of Texas divided into the following categories: (1) registration and Election Day voting; (2) methods of election; (3) annexations and

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[14] *See generally March 8, 2006 Hearing*, at 104-290 (report by the National Commission on the Voting Rights Act), *available at* http://www.votingrightsact.org/report/finalreport.pdf.

de-annexations; (4) redistricting; (5) polling place changes; and (6) other types of discrimination. A final category discusses jurisdictions that have had multiple acts of discrimination deterred by Section 5, or by some combination of Sections 2 and 5.

Registration and Voting

Due in large part to the VRA, minority registration has increased dramatically in the covered jurisdictions. Still, in 2006, Congress reviewed considerable evidence of purposeful discrimination designed to suppress minority registration and turnout.

Almost 100 years after Mississippi enacted a dual-registration requirement for municipal and non-municipal elections as part of the "Mississippi Plan" to deny Blacks the right to vote, that requirement still had its intended discriminatory consequences: many Blacks were not registered because the burdens of the complex dual-registration system (including limited access to registration sites) fell more heavily on Black citizens, who disproportionately lacked access to automobiles or telephones. *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1251-55 (N.D. Miss. 1987). Black voters brought a lawsuit challenging the system, and, in 1987, a federal district court found that the dual-registration law had been enacted for a discriminatory purpose, continued to have a discriminatory effect, and violated Section 2 of the VRA. *See id.* at 1268. The Fifth Circuit affirmed in 1991. *See Mississippi State Chapter, Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991). Then, just four years later, the State

once again established a dual-registration system (this time for state vs. federal elections), ostensibly for the purpose of complying with the National Voter Registration Act. *See* J.S.App. 78-79. Mississippi refused to seek preclearance. *See id.* Individual voters then brought a Section 5 enforcement action, and this Court unanimously held that preclearance was required. *See Young v. Fordice*, 520 U.S. 273 (1997).

In the wake of *Young*, the State finally submitted its dual-registration system for preclearance, and DOJ applied the *Arlington Heights* test to interpose a discriminatory-purpose objection. *See October 25, 2005 (History) Hearing*, at 1603-04. DOJ noted that the racially discriminatory effects of this system "were not just foreseeable but almost certain to follow." *Id.* at 1603. Moreover, proposals supported by election officials that would have mitigated this discriminatory impact were "rejected under somewhat unusual circumstances," with state officials offering "insubstantial" reasons for their opposition and in some cases couching it in racially charged terms. *Id.* [15]

Notwithstanding Appellant's mischaracterization of the record, (Br. at 44), the entrenched discrimination illustrated by Mississippi's dual-registration system lasted over a century, and was

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[15] For another example of a Jim Crow voting law that was not invalidated until after the 1982 reauthorization, *see Hunter v. Underwood*, 471 U.S. 222 (1985).

only remedied by the combined enforcement of Sections 5 and 2.

Congress also learned in 2006 that race continues to affect minority voting access in other ways. In 2004, Long and Atkinson Counties in Georgia required Latino registered voters, whose citizenship had been challenged because of their Spanish surname, to attend a hearing to establish citizenship; the registrar in Atkinson County facilitated the challenge process by supplying a segregated list of registered voters with Spanish surnames. *See October 18, 2005 Hearing*, at 474-78. Long County later entered into a settlement agreement with DOJ based on the county's handling of these mass challenges. *March 8, 2006 Hearing*, at 1531. Latinos in Arizona also experienced widespread discrimination when attempting to vote in 2004; poll workers asked Latinos (but not Anglos) for identification, trucks with megaphones were parked outside of heavily-Latino precincts and the drivers warned residents that they would be deported if they wrongfully registered to vote, and police cars circled around polling places. *See id.* at 3979-80.

Black voters likewise continue to face widespread intimidation and harassment. In 2005, literature was disseminated in Black neighborhoods in Danville, Virginia, threatening to lynch African Americans and warning that if residents "'didn't vote a certain way certain things could happen to you.'" *Id.* at 2045. In 2003, a federal court found "significant evidence of intimidation and harassment" by poll managers in predominately minority precincts in Charleston County, South Carolina that "never occurred at predominately white polling places."

United States v. Charleston County, 316 F. Supp. 2d 268, 286 n.23 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir. 2004) (Wilkinson, J.). During New York City's 1993 mayoral election, off-duty police officers, with guns in view, blanketed polling sites in Black communities. *October 18, 2005 Hearing*, at 62. The previous year, poll workers in Hale County, Alabama closed a polling place early so that Black voters from a local fish processing plant could not vote; Congress learned that similar tactics were common in the county. *See March 8, 2006 Hearing*, at 302. And in North Carolina's 1990 Senate election, 125,000 Black voters were mailed postcards on the eve of the election stating, incorrectly, that they could not vote if they had moved within 30 days of the election. *March 8, 2006 Hearing*, at 1737. Two years later, DOJ obtained a consent decree banning this practice. *See id.* & n.70.

Congress also heard examples of voter fraud designed to prevent Blacks from gaining political power, and of severe discrimination against potential Black poll workers. In McCormick County, South Carolina, the clerk of the County Board of Registrars pleaded guilty to rigging a 1994 state house election in favor of the long-time white incumbent, who was running against an African-American challenger. *Id.* at 1973. The year before, DOJ settled Section 2 lawsuits against five Georgia counties that had discriminated against potential Black poll workers. *Id.* at 1526 & n.129. Similarly, Alabama's intentionally discriminatory laws and processes caused "black persons [to be] grossly underrepresented among poll officials, with the result that polling places across the state continue to be

viewed by many blacks as areas circumscribed for whites and off-limits for blacks." *Harris v. Graddick*, 593 F. Supp. 128, 133 (M.D. Ala. 1984); *see Harris v. Siegelman*, 695 F. Supp. 517, 526 (M.D. Ala. 1988).

Methods of Election

Even more common than these ongoing efforts to suppress minority registration and turnout are efforts to cancel out the impact of the minority vote, by, as one example, the adoption of discriminatory methods of election.

In 2004, the South Carolina legislature enacted a law effectively prohibiting single-shot voting and adding a majority-vote requirement to Charleston County's at-large school board elections, notwithstanding: (1) a judicial finding only months earlier that this method of election for Charleston's county council illegally diluted minority voting strength in violation of Section 2, and (2) evidence that elected officials understood the retrogressive nature of the change. *See March 8, 2006 Hearing*, at 175-76. Indeed, this change was the culmination of a series of efforts by the Charleston County state legislative delegation to alter the method of election for, or reduce the powers of, the Charleston County school board after the 2000 election resulted in Blacks gaining a majority of seats on the board for the first time in history. *See United States v. Charleston County*, 316 F. Supp. 2d at 290 n.23. DOJ interposed an objection. J.S.App. 172. Thus, once again, Sections 5 and 2 worked in tandem to remedy discrimination against minority voters, but while the Section 5 objection had immediate impact, the Section 2 litigation lasted several years and cost

millions of dollars. *March 8, 2006 Hearing*, at 175-76.

Another example of a State facilitating discrimination by local jurisdictions arises out of Louisiana. In 2001, Louisiana enacted legislation allowing the electors of St. Bernard Parish to reduce the size of the parish school board from eleven single-member districts to five single-member districts and two at-large seats. *Id.* at 1618. A federal court found that the proposed plan violated Section 2 because, unlike the existing plan, it did not include any African-American opportunity districts—that is, a district where Black voters have an opportunity to elect candidates of choice. *Id.* During a hearing in the case, a white state senator, Lynn Dean, offered testimony that exhibits the racial animus that some elected officials still harbor. *Id.* at 1693-94. When asked whether he had heard the word "nigger" used in the parish, Dean testified that "he uses the term himself, ha[d] done so recently, that he does not necessarily consider it a 'racial' term and that it is usable in jest, as well." *Id.* Dean's interest in and influence over the composition of the parish's school board stemmed from his service on that body for 10 years prior to his election to the state senate. *Id.* at 1618.

Northampton County, Virginia provides another recent example of a jurisdiction enacting consecutive discriminatory methods of election. In 2001, despite racially polarized voting, the county proposed switching from six single-member districts, three of which were majority-minority, to three dual-member districts, all with majority-white voting-age populations. DOJ objected to this plan, concluding

that the county's stated justification was inaccurate, and that it had inexplicably abandoned consideration of non-retrogressive alternatives. *See October 25, 2005 (History) Hearing*, at 2484-86. The county responded with two more retrogressive plans, which drew objections from DOJ in May and October 2003. *See id.* at 224, 2592-95; *March 8, 2006 Hearing*, at 2040.

Two objections from the 1990s further illustrate that Sections 2 and 5 of the VRA are both needed to remedy discrimination by covered jurisdictions. In July 1993, plaintiffs agreed to settle a Section 2 lawsuit challenging Mt. Olive, North Carolina's use of at-large elections for the town's board of commissioners. Two months later, the board abandoned the redistricting plan to which the parties had agreed, and promulgated a new discriminatory plan. DOJ interposed a discriminatory-purpose objection, concluding that the board's justification for adopting the new plan appeared pretextual. *October 25, 2005 (History) Hearing*, at 1823-24. The racial animus underlying the board's conduct was confirmed by its extraordinary efforts to freeze the only Black member of the board out of the decisionmaking process: "the board petitioned [a] court to prohibit her from participating in board discussions or voting on the method of election issues raised by the Section 2 litigation." *Id.* at 1824.

In 1993, Newport News, Virginia drew a discriminatory-purpose objection when it attempted to implement at-large elections for its school board—its second method-of-election objection in four years. *Id.* at 2573. Then, in 1994, the city entered into a consent decree in parallel suits brought by Black

voters and the United States, in which it acknowledged discriminating against African Americans in violation of Section 2 and the Fourteenth and Fifteenth Amendments through its system of at-large city council elections. *See* J.S.App. 102. Thus, far from proving that Section 5 is unnecessary as Appellant contends, (Br. at 47-48), the repeated efforts of Newport News to discriminate against minority voters were only remedied through two Section 5 objections and one Section 2 lawsuit.

Other jurisdictions failed even to submit for preclearance method-of-election changes that adversely affected Black voters. Indeed, as this Court unanimously stated in *Clark v. Roemer*, 500 U.S. 646 (1991):

> [T]he State of Louisiana failed to preclear . . . judgeships as required by § 5. It received official notice of the defect in July, 1987 [when individual citizens filed a Section 5 enforcement action], and yet three years later, it had still failed to file for judicial preclearance. . . . It scheduled elections for the unprecleared seats in the fall of 1990 even after the Attorney General had interposed objections under § 5. In short, by the fall 1990 election, Louisiana had with consistency ignored the mandate of § 5.

Id. at 655. *See also May 10, 2006 Hearing*, at 139 (enforcement action under similar circumstances in Mississippi).

The Addendum to this brief references additional discriminatory-purpose objections to method-of-election changes designed to minimize minority voting strength in: Monterey County, CA (2002); Gaffney, SC (1996); Greenville, MS (1995); North Carolina (1990, 1987, 1986, and 1984 for changes affecting covered counties); Chambers County, AL (1990); Anderson County, SC (1990); Lancaster, SC (1989); Bladen County, NC (1987); Cottonport, LA (1987); Wilson County, NC (1986); Newberry County, SC (1984) and Greenville, VA (1982). In each case, the jurisdiction's discriminatory intent was revealed by one or more of the following circumstances: (1) evidence of discrimination by state or local officials in the deliberative process; (2) unexplained departures from neutral legislative practices; or (3) the jurisdiction's failure to provide any non-pretextual, nonracial justification for its plan. *See October 25, 2005 (History) Hearing*, at 3319-22; 2053-56; 1516-21; 1788, 1771-13, 1736-40, 1712; 358-59; 1963-65; 1952-54; 895-96; 1738; 1731-32; 1894-95; 2549-51.

Redistricting

During the 2006 reauthorization process, Congress received extensive evidence of purposefully discriminatory redistricting plans enacted by covered jurisdictions since 1982—many of which were remedied by Section 5. This evidence spanned numerous covered jurisdictions, many of which drew multiple objections for discriminatory redistrictings, at both the state and local levels.

"In one particularly stark example, Congress heard testimony that not one redistricting plan for the Louisiana House of Representatives had ever

been precleared as originally submitted." J.S.App. 70. After the 2000 Census, Louisiana sought judicial preclearance for its state house redistricting plan, but acknowledged that it intentionally increased electoral opportunities for white voters at the expense of such opportunities for African-American voters. During the judicial preclearance litigation, the three-judge court criticized the State for "blatantly violating important procedural rules" and for a "radical mid-course revision in [its legal] theory"; the court noted that the State's conduct bordered on sanctionable. *La. House of Reps., et al., v. Ashcroft*, No. 02-0062 at 1, 2 (D.D.C. Feb. 13, 2003) (three-judge court). On the eve of trial, Louisiana withdrew the preclearance action, and restored an African-American opportunity district after evidence emerged that the plan the State had submitted for preclearance violated the State's own redistricting principles. *See March 8, 2006 Hearing*, at 1608.

Ten years earlier, Louisiana had similarly discriminated against Blacks in its state house redistricting. Then, Louisiana did not consistently apply its stated redistricting criteria; rather, it applied those criteria when doing so would deprive Black voters of an opportunity district and departed from those criteria when doing so would deprive Black voters of an opportunity district. *See October 25, 2005 (History) Hearing*, at 951-52.

Similarly, Mississippi drew a discriminatory-purpose objection to its redistricting plan for the state senate following the 1990 Census, which was similar to an objection DOJ interposed to its congressional redistricting plan following the 1980 census. *See id.* at 1183-86; J.S.App. 79. In both

circumstances, DOJ concluded that the plan was calculated to minimize Black voting strength in the Delta region; after the 1990 census, legislators privately referred to an alternative plan that would have increased the number of majority-Black districts as the "nigger plan." J.S.App. 80.

Like Mississippi, Alabama drew statewide redistricting objections from DOJ after both the 1980 and 1990 Census. In 1991, the State failed to provide a plausible nonracial explanation for fragmenting concentrated Black populations, and DOJ had reason to believe that the "underlying principle of the Congressional redistricting was a predisposition on the part of the state political leadership to limit Black voting potential to a single district." *October 25, 2005 (History) Hearing*, at 385-86. After the 1980 Census, the State "systematically reduc[ed] the influence which Black voters . . . enjoy" in ten urban legislative districts and eliminated entirely four Black-majority districts in rural counties. *See id.* at 264-65. DOJ determined that the State's districting choices "do not appear to have been necessary to any legitimate governmental interest" and were not applied neutrally throughout the State. *Id.* at 265.[16]

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[16] In his amicus brief, Governor Bob Riley concedes that Alabama "earned its spot on §5's original coverage list," but argues that by renewing the State's coverage in 2006, "Congress wrongly equated Alabama's modern government, and its people, with their Jim Crow ancestors." Governor Riley Amicus Br. at 1-2. Governor Riley, however, fails to recognize that the Congressional standard was not simply improvement (which is undeniable) but equality (which remains elusive).

Arizona has drawn Section 5 objections to its statewide legislative redistricting plans after each decennial census since it was first covered. In 2001, DOJ concluded that the legislative redistricting plan was not only retrogressive for Latino voters, but in addition the circumstances surrounding the drawing of at least one district "raised concerns that [the districting decision] may have also been taken, at least in part, with a retrogressive intent." *Id.* at 500.[17] DOJ similarly concluded that the proposed

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Particularly misplaced is Governor Riley's suggestion—which relies wholly on post-reauthorization evidence—that race has lost its salience in Alabama elections. *Id.* at 9-11. Congress in 2006 learned that Alabama has no Black officials elected statewide, and virtually all Black officials are elected from majority-minority districts. *See July 13, 2006 Hearing*, at 388-89. Although not before Congress, the 2008 Presidential election results confirm the existence of extreme racial polarization in Alabama. President Obama received support from only 10% of white voters in Alabama—his worst showing among the 50 states. Nathaniel Persily, *et al.* Amicus Br. at 11-12. Shortly before the election, one Alabama resident predicted of Obama: "'He's going to tear up the rose bushes and plant a watermelon patch . . . .'" Adam Nossiter, *For Some, Uncertainty at Racial Identity*, N.Y. Times, Oct. 4, 2008, at A21.

[17] That an Independent Redistricting Commission (IRC) proposed this plan does not weaken the force of this objection. *Cf.* Scharf-Norton Amicus Br. at 2-3. A purposefully retrogressive redistricting plan is no less discriminatory because it was initially proposed by an IRC. Furthermore, contrary to the Scharf-Norton Center's suggestion, *id.*, the retrogressive-effect prong of Section 5 simply requires that minority voters have an equal opportunity to elect candidates of choice as they did in the benchmark plan; it does not forbid competitive elections.

redistricting plan following the 1990 Census discriminated against Latino voters, and that the State provided pretextual reasons for rejecting non-discriminatory alternatives. *Id.* 476, 481-82. After the 1980 Census, the State could not offer a plausible non-discriminatory reason for enacting a redistricting plan that was retrogressive for American Indian voters. *Id.* 454-55.

Congress also learned of South Dakota's discrimination against Indian voters in its 2001 legislative redistricting plan. *May 9, 2006 Hearing*, at 86 (*citing Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004)). In *Bone Shirt*, American Indians were packed into a single district where they constituted 90 percent of the voting-age population. 336 F. Supp. 2d at 1048. After rejecting the State's argument that "non-tenuous policies" supported this packing and noting that the state legislature's redistricting committee received almost no input from the Indian community, a court held that the statewide redistricting violated Section 2. *See id.* at 1047-48. Tellingly, only two years earlier, American

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For a similar reason, the contention of amicus Thernstrom, *et al.*, that amendments to Section 5 will "preserve[] in amber until 2031 all extant majority-minority districts . . . regardless of changes in voting patterns," is false. Br. at 4; *see id.* at 26-28. The ability-to-elect standard, codified at 42 U.S.C. § 1973c(b), does not require the maintenance of majority-minority districts regardless of voting patterns. If racially polarized voting declines, the elimination of majority-minority districts will not be retrogressive because minority voters will have an equal opportunity to elect candidates of choice in majority-white districts. *See, e.g., March 8, 2006 Hearing*, at 301-02.

Indians in the State's covered counties successfully sued South Dakota for enacting hundreds of voting changes between 1976 and 2002 and failing to submit them for preclearance. *October 25, 2005 (Continuing Need) Hearing*, at 131.

In recent years, numerous cities, counties, and other local jurisdictions have also promulgated racially discriminatory redistricting plans. In the opinion below, the District Court described Section 5 objections that prevented the enforcement of redistricting plans motivated by a discriminatory (or after 2000 retrogressive, *see* note 3, *supra*) purpose in: Delhi, LA (2005); Ville Platte, LA (2004); Pittsylvania County, VA (2002); Albany, GA (2002); Webster County, GA (2000); Grenada, MS (1998); Tallapoosa County, AL (1998); and Greensboro, AL (1994). J.S.App. 155-83.

Other examples abound. In 2002, DeSoto Parish and the City of Minden, Louisiana each drew retrogressive-purpose objections from DOJ for adopting redistricting plans that, by local officials' own accounts, were intentionally designed to reduce opportunities for Blacks to elect candidates of choice. *See October 25, 2005 (History) Hearing*, at 1157-60; 1150-52. Also in 2002, South Carolina drew a retrogressive-purpose objection for its apportionment of school board districts in Union County. Applying *Arlington Heights*, DOJ noted, *inter alia*, that Black residents of the county were frozen out of the deliberative process, and that the State did not explain why it had not considered available non-retrogressive plans that were consistent with its stated redistricting goals. *See id.* at 2086-87. And in 2001, DOJ interposed a retrogressive-purpose

objection when the City of Greer, South Carolina eliminated the sole minority-opportunity district for municipal elections. The evidence showed that the city proffered pretexual reasons for altering its apportionment plans to satisfy concerns raised by white citizens while quickly rejecting proposals supported by minorities. *See id.* at 2080.

Jurisdictions also frequently adopted discriminatory plans when minority communities were on the verge of exercising political power, and often more than one Section 5 objection was necessary to deter this type of discrimination. For example, the 1990 Census revealed that the Black population of Selma, Alabama grew from 52.1% to 58.4%. The city responded by packing Black voters into four districts (three of which were over 90% Black) and fragmenting Black neighborhoods across the remaining five districts. *Id.* at 391. In a 1992 objection letter, DOJ found that the city's reasons for rejecting a nondiscriminatory alternative "appear[ed] to be pretextual"; the city was actually "motivated by the desire to confine black population concentrations into a predetermined number of districts, and thus ensure a continuation of the current white majority on the council." *Id.* at 392. Selma then submitted a new redistricting plan that drew an objection in 1993. While addressing some of the concerns expressed in DOJ's 1992 objection, the new plan continued to "fragment[] black population concentrations . . . in an apparent effort to limit the opportunity for black voters to elect more than four councilmembers." *Id.* at 403. Minutes from a council meeting at which the plan was adopted confirmed that the city was motivated by intentional discrimination. *Id.*

The Town of Johnston, South Carolina and East Carroll Parish, Louisiana similarly each drew consecutive discriminatory-purpose objections in the 1990s for intentionally packing African-American voters, who represented a majority of the electorate, into a minority of districts. *See id.* at 1980-82, 2003-05; 1013-15, 985-86. Similarly, Marion County and Lee County, South Carolina each drew an objection in 1993 when, faced with increases in Black population, the counties placed a quota on how many Black residents could be included in the districts that would determine majority control of the county council and school board. *See id.* at 1992-95; 1996-99.

In addition to the examples discussed above and in the District Court's opinion, DOJ objected to redistricting plans submitted by the following jurisdictions where the evidence—either in the form of explicit statements during the deliberative process or powerful circumstantial evidence (*e.g.*, freezing the minority community out of deliberations, departing from normal legislative rules, or failing to provide a non-pretextual, nonracial reason for a change)—indicated that the jurisdiction had been motivated by a discriminatory or retrogressive purpose: Sumter County, SC (2002); Orangeburg County, SC (1992); Dallas County, AL (1992 (two separate objections), 1987 & 1986); Catahoula Parish, LA (1991); Bolivar County, MS (1991); Edgefield County, SC (1987); Yazoo County, MS (1986, 1985, & 1983); Pointe Coupee Parish, LA (1983); LaSalle Parish, LA (1982) and McDonough, GA (1982). *October 25, 2005 (History) Hearing*, at 2082-84; 1983-85; 397-99, 388-90, 327-29, 310-12; 972-73; 1414-16; 1935-37; 1344-45, 1330-31, 1265-67; 884-68; 867-69; 581-83.

Annexations and De-Annexations

Since the 1982 renewal, Section 5 blocked purposefully discriminatory annexations and de-annexations by many covered jurisdictions similar to those discussed above by Lamesa and Webster, Texas. In several cases, discriminatory annexations were part of a systematic effort to prevent minority voters from electing candidates of choice. In 1993, DOJ objected (for the second time in four years) to Foley, Alabama's policy of encouraging petitions for annexation from majority-white residential areas while discouraging or rejecting petitions from predominately African-American areas; the city could offer no legitimate nonracial explanation for this policy. *See October 25, 2005 (History) Hearing*, at 406. Foley had adopted its discriminatory annexation policy shortly after a successful Section 2 challenge to its at-large elections. *See Dillard v. City of Foley*, 926 F. Supp. 1053, 1059 (M.D. Ala. 1995) (describing court's 1989 order).

In 1994, DOJ objected to Shreveport, Louisiana's annexation of white-suburban wards to its city court jurisdiction; the annexations would have changed the population of that at-large jurisdiction from 54% to 45% African-American. Despite DOJ's initial objection, the city tried a total of five more times, twice in 1995, in 1996, and twice in 1997. Each time, DOJ informed the city that it would have no objection if Shreveport changed its at-large method of electing judges to help ameliorate the discriminatory effect of the annexations, and each time, the city refused to make that change. *March 8, 2006 Hearing*, at 1615-17.

Other purpose-based objections tell a similar story. As discussed by the District Court, Section 5 objections prevented the Town of North, South Carolina (2003) and the City of Grenada, Mississippi (1998) from implementing discriminatory annexations designed to prevent African Americans from exercising political power. J.S.App. at 165-67, 175-76. In 1994, Hemingway, South Carolina drew a purpose-based objection for its racially selective annexations. The town had initially refused to submit its annexations for preclearance and did so only after Black residents succeeded in a Section 5 enforcement action. *March 8, 2006 Hearing*, at 1065. DOJ objected, concluding that the town provided a pretextual reason for its annexation decisions; indeed, after the local regional planning agency concluded that it was more feasible for the town to annex a predominately African-American residential area than a nearby predominately white area, the town did the opposite. *See October 25, 2005 (History) Hearing*, at 2028-30. After DOJ's objection, Hemingway decided to take the unusual step of de-annexing recently annexed areas rather than annexing predominately Black areas. *October 20, 2005 Hearing*, at 83.

In 1987, Augusta, Georgia drew an objection to its pursuit of an "annexation policy center[ed] on a racial quota system requiring that each time a black residential area is annexed into the city, a corresponding number of white residents must be annexed in order to avoid increasing the city's black population percentage." *October 25, 2005 (History) Hearing*, at 642-43. Augusta went so far as to conduct door-to-door surveys to identify white

residential areas for annexation. *See id.* DOJ withdrew its objection the following year, after the city settled Section 2 litigation, which resulted in a new method of election that was nondiscriminatory. *See March 8, 2006 Hearing*, at 1516 n.78.

In addition to the examples discussed above, DOJ interposed objections to purposefully selective annexations or de-annexations in Ahoskie, NC (1989); Prichard, AL (promulgated by the State of Alabama) (1987); Greensboro, AL (1985); and Sumter, SC (1985). *See id.* at 1781-83; 319-20; 305-06; 1915-16.

Discriminatory Polling Place Changes

As in Texas, other covered jurisdictions have attempted to suppress minority turnout by relocating polling places to intimidating or remote venues. In Jenkins County, Georgia for instance, the county proposed moving the polling place from an accessible venue inside the City of Millen to an inaccessible—and for pedestrians, potentially dangerous—location in a predominately white neighborhood outside of the city limits. (Thirty-eight percent of African-American households, compared to 4% of white households, lacked a vehicle.) The decision came shortly after a Section 2 lawsuit forced Millen to alter its method of election. *March 8, 2006 Hearing*, at 1524 n.120. After reviewing the evidence, DOJ concluded in 1995 that the county's selection of the new polling location "appears to be designed, in part, to thwart recent black political participation." *October 25, 2005 (History) Hearing*, at 816.

Applying *Arlington Heights*, DOJ reached a similar conclusion in 1999 when the council in

Dinwiddie County, Virginia chose an all-white church in the extreme eastern (and predominately white) part of a rural precinct as a polling place, thus disregarding both the recommendation of the county electoral board and the council's stated goal of finding a more centrally located polling site. *See October 25, 2005 (History) Hearing*, at 2579-83; J.S.App. 182-83. That same year, McComb, Mississippi drew an objection when it proposed moving a polling place to an inaccessible location for minority voters; the county disregarded concerns articulated during the deliberative process and made no effort to consider nondiscriminatory alternatives. *See October 25, 2005 (History) Hearing*, at 1613-14; *see also id.* at 1090-92; 726-28 (describing purposefully discriminatory polling place changes in St. Landry Parish, LA (1994) and Johnson County, GA (1992)).

Other Discrimination

Covered jurisdictions used a variety of other tactics to discriminate against minority voters. For example, some jurisdictions adopted implementation schedules intended to delay changes that would allow minority voters to elect candidates of choice. After resolution of an aforementioned Section 2 suit led the City of Millen, Georgia to switch from at-large elections to a system of double- and single-member districts in 1993, *see March 8, 2006 Hearing*, at 1524 n. 120, the city proposed delaying the election in a Black-opportunity district (the district that would permit Black voters to elect a majority of candidates of choice to the city council) until 1995, leaving that district unrepresented in the two-year interim. *See October 25 (History) Hearing*, at 743-45.

Similarly, Cleveland, Mississippi drew an objection when it obtained a state court order authorizing the abandonment of a single-member districting plan that would have given Black voters a fair opportunity to elect candidates to the school board, and the cancellation of the November 1990 election entirely. *See id.* at 1395-97, 1405-07. In addition to these examples, DOJ interposed objections under similar circumstances to implementation delays by consolidated school districts in Aiken and Saluda counties, SC (1986) and Cumberland County and Fayetteville City, NC (1985). *October 25, 2005 (History) Hearing*, at 1721-22; 1926-28.

Nor was this type of discrimination limited to the local level. Louisiana proposed to cancel the 1984 presidential preference primary, claiming the suspension was necessary because of budget issues. DOJ observed that the suspension would "undeniably reduce the opportunities for Blacks to participate meaningfully in the delegate selection process," and also noted that the timing of the proposed election cancellations came "on the heels of the announcement of the Reverend Jesse Jackson to enter the presidential race." *Id.* at 890-92.

Other examples of creative discrimination include Kilmichael, Mississippi (2001) (canceling elections after the 2000 Census indicated that multiple Black aldermen and local officials could be elected during the 2001 election), *see* J.S.App. 78; *October 25, 2005 (History) Hearing*, at 1616-19; Charleston County, South Carolina (1991) (substantially reducing the salary of probate court judge following the election of the first African

American to that position), *see Charleston County*, 316 F. Supp. 2d at 286 n.23; Richland County, South Carolina (1988) (enacting a resignation requirement designed to create an economic disincentive for potential Black candidates), *see October 25, 2005 (History) Hearing*, at 1948-51; Bamberg County, South Carolina (1986) (scheduling the Democratic Primary only 21 days after the election was called, despite a state law requiring a minimum of eleven weeks, for the apparent purpose of severely disadvantaging the candidate of choice of the Black community), *see id.* at 1932-33; North Carolina (1986) (resuming an election schedule for a special primary election in a judicial district, despite DOJ's objection the month before to the method-of-election used by that district), *see id.* at 1733-35,1745-47.

The Persistent Nature of Discrimination

Notwithstanding Appellant's insistence that "gamesmanship" is a thing of the past in the covered jurisdictions, (Br. at 42, 63), the foregoing discussion documents numerous jurisdictions that have enacted new discriminatory measures after prior measures had to be abandoned.[18] Several additional examples are discussed below.

Not only did Selma, Alabama draw multiple Section 5 objections since the last reauthorization, Dallas County (where Selma is located) drew three separate objections in the 1990s for retrogressive

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[18] As discussed by Intervenors-Appellees NAACP, *et al.*, evidence of gamesmanship is not required to demonstrate the constitutionality of Congress's decision to reauthorize Section 5.

redistricting plans that appeared motivated by an attempt to limit Black electoral success. *See October 25, 2005 (History) Hearing*, at 388-90, 397-401.

Serial violations of the Act were also in evidence in Burke County, Georgia: the same county where, at least until the late 1970s, a segregated laundromat operated near the county courthouse, and, in the courthouse itself, faded paint over restroom doors did not fully conceal the words "colored" and "white." *Rogers*, 458 U.S. at 631 n.1 (Stevens, J., dissenting). In 1982, while this Court in *Rogers v. Lodge* analyzed the constitutionality of the county's at-large system for electing county commissioners, *see id.* at 614-15, Waynesboro, the county seat, was unlawfully implementing an unprecleared majority-vote requirement for its mayoral elections. *October 25, 2005 (History) Hearing*, at 788-89. DOJ had previously objected to the same majority-vote requirement in 1972. *See id.* at 788. Then, in 1977, the town reinstituted the requirement, and did not seek preclearance until 1994, which was denied as the change was retrogressive given the level of continued racially polarized voting in Burke County. *Id.* at 789.

Another noteworthy example comes from South Carolina. In 1994, the South Carolina legislature abolished the elected Spartanburg County Board of Education after Section 2 litigation resulted in a consent decree changing the method of electing members of that board from at-large elections to single-member districts. *See October 25, 2005 (History) Hearing*, at 2041-43. In interposing a Section 5 objection, DOJ found that "[t]he sequence of events surrounding the adoption of [the state law]

gives rise to an obvious inference of discriminatory purpose." *Id.* at 2042.

This objection, however, did not deter the South Carolina legislature, which attempted effectively to abolish the school board again in 1995. This time, the State proposed to transfer some, but not all, of the county school board's responsibilities to seven local school districts, and to de-fund the elected school board. *See October 25, 2005 (History) Hearing*, at 2049-52. DOJ determined that "the county board retain[ed] substantial powers and duties" despite the redistribution of power to local school districts, which rendered the redistribution of authority not subject to Section 5 review under *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992). *October 25, 2005 (History) Hearing*, at 2050. South Carolina's decision to de-fund the county board, however, "result[ed] in the *de facto* elimination of the county board" for at least one year, and fell within the *Presley* exception because "minority voters would lose their newly-won electoral opportunities" on the county board. *Id.* at 2050-51. Noting that the same legislator who sponsored the objected-to 1994 law sponsored this new law de-funding the local school board, and that the State could not offer a tenable nonracial justification for the law, DOJ again interposed a discriminatory-purpose objection. *See id.* at 2051.

In addition to the examples discussed above, numerous other jurisdictions were deterred by a combination of multiple Section 5 objections, or at

least one Section 5 objection and one Section 5 enforcement suit, including: McComb, MS (2005),[19] DeSoto Parish, LA (2002); Minden, LA (2002); Point Coupee Parish, LA (2002); Alabaster, AL (2000); St. Martinville, LA (1997); Shreveport, LA (1997); Monroe County, MS (1995); Chickasaw County, MS (1995); St. Landry, LA (1994); Madison Parish, LA (1993); West Feliciana Parish, LA (1993); Lafayette Parish, LA (1993); East Carroll Parish, LA (1993); Batesburg, SC (1993); Sunflower County, MS (1992); Bolivar County, MS (1991); Leflore County, MS (1991); Morehouse Parish, LA (1992); and Yazoo County, MS (1986).[20] Since the VRA was reauthorized in 2006, Randolph County, Georgia and Fayetteville, North Carolina have joined this group of jurisdictions with multiple Section 5 actions since the 1982 reauthorization.[21]

Similarly, in addition to the examples discussed above, in the following jurisdictions, a combination of Section 2 (or constitutional) litigation and at least one Section 5 objection or enforcement action was necessary to remedy discrimination: Albany, Georgia

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[19] Parenthetical dates reflect the most recent Section 5 action.

[20] See *October 25, 2005 Hearing*, at 435-39 (Alabama example); *March 8, 2006 Hearing*, at 1618-20, 1667-69, 1651-54; *October 25, 2005 (History) Hearing*, at 1027, 1132, (Louisiana examples); *March 8, 2006 Hearing*, at 714-15; *October 25, 2005 (History) Hearing*, at 159-72; *May 10, 2006 Hearing* at 91 (Mississippi examples); *March 8, 2006 Hearing*, at 1030-31; *October 25, 2005 (History) Hearing*, at 188-91 (South Carolina examples).

[21] *See* Objection Nos. 2007-2233; 2006-3856, *available at* http://www.usdoj.gov/crt/voting/sec_5/obj_activ.php.

(2003); Harnett County, NC (2002); Washington Parish, LA (1999); Tallapoosa, AL (1998); Granville County, NC (1996); Chickasaw County, MS (1995); Foley, AL (1995); Hemingway, SC (1994); Calhoun County, GA (1992); Orangeburg, SC (1992); Edgefield County, SC (1992); Navajo and Apache Counties, AZ (1989); Richland County, SC (1988); Pitt County, NC (1988); Bladen County, NC (1987); Wilson County, NC (1986); Marengo County, AL (1986); Elizabeth City, NC (1986).[22]

Examples of jurisdictions that drew a Section 5 objection or were successfully sued under Section 2, and then later withdrew a separate preclearance submission are: Beaufort County, NC (2002); Edgecombe County, NC (2001); Pitt County, NC (1996); Prince Edward County, VA (1993); Halifax County, NC (1991); and North Martin County, NC (1991).[23]

Accordingly, while the roots of the constitutional violations that Congress examined were "decades

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[22] *See October 25, 2005 (History) Hearing*, at 429-34; 310-12; *Dillard*, 926 F. Supp. at 1053 (Alabama examples); *March 8, 2006 Hearing*, at 1407-08 (Arizona example); *March 8, 2006 Hearing*, at 686-90, 1526 n.129; 652-56; 634-35; *October 25, 2005 (History) Hearing*, at 138 (Georgia examples); *March 8, 2006 Hearing*, at 1616, 1653 (Louisiana examples); *March 8, 2006 Hearing* at 1715-16 (Mississippi example); *March 8, 2006 Hearing*, at 1790-91; 1752-53, 1797-98; 1773-77; 1748; 1733-34 (North Carolina examples); *March 8, 2006 Hearing*, at 1970, 1033-39; 1015-17; 1964-65 (South Carolina examples).

[23] *See March 8, 2006 Hearing*, at 1750, 2049, 2089. A list of all objections, organized by state, is available at http://www.usdoj.gov/crt/voting/sec_5/obj_activ.php

old", Br. at 2, 23, its manifestations and threats are real, specific, and continuing.

But for Section 5, the vast majority of the incidents described in this section would have come out differently, and, as a result, the ability of minorities to participate in our democracy would have been severely impaired.

* * *

Appellant also points to evidence that was not before Congress, namely, the election of Barack Obama as the country's first African-American President, to support its view that Section 5 has outlived its utility. Br. at 1. This post-reauthorization event bears little relevance to the issue of Congressional judgment in 2006. Analysis of the voting patterns during the 2008 presidential election, however, underscores the reasonableness of Congress's judgment. Consistent with the evidence before Congress in 2006, *amici curiae* Nathaniel Persily, *et al.*, observed stark racially polarized voting in the covered jurisdictions. Indeed, the results reveal an increase in the differences in voting choices between whites and minorities in the covered jurisdictions that is attributable both to the "reluctance of whites to vote for Barack Obama and the increased cohesion among minority voters." Br. at 6. The election returns from several Section 5-covered States bring into sharper focus the decisive role that race played in voting choices in the 2008 Presidential election. Obama's level of white support was 10% in Alabama, 11% in Mississippi, and 14% in Louisiana. *Id.*

More broadly, while the historically significant election of the nation's first African-American president represents a milestone that was not visible in 1965, no event, no matter how significant, can instantaneously erase the legacy of Jim Crow and its enduring effects.

C. Congress Considered the Interests of the Covered Jurisdictions

Sensitive to federalism concerns, Congress also heard evidence about the administrative burden imposed by Section 5 and found that burden modest. *See, e.g., May 16, 2006 Hearing,* at 64-65; *May 17, 2006 Hearing*, at 9-11, 25. Under Section 5, the only imposition for the vast majority of proposed changes is a short suspension period for the change before it goes into effect while DOJ undertakes an administrative review that generally must be completed within 60 days. 42 U.S.C. § 1973c(a). As Don Wright, General Counsel of the North Carolina State Board of Elections testified, county officials he has worked with find that "preclearance requirements are routine and do not occupy an exorbitant amount of time, energy or resources[.]" *June 21, 2006 Hearing*, at 12. Wright continued: "I could probably knock-out a pre-clearance on a routine matter in a half hour." *Id.*

Indeed, Congress learned that Section 5 is viewed by many election officials in the covered jurisdictions as a tool that enhances the integrity of the political process and helps to avoid litigation. *June 21, 2006 Hearing*, at 12-13; *May 17, 2006 Hearing*, at 1415. Numerous organizations representing the interests of local and state governments (including covered

jurisdictions) filed a statement of unqualified support for Section 5's renewal. This letter, from the Council of State Governments, the National Conference of State Legislatures, the National Association of Secretaries of State, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors, stated: "While substantial progress has been made since passage of the Voting Rights Act in 1965, it has not yet resulted in the elimination of voting discrimination. Congress must renew [Section 5 and the other temporary] provisions of the Voting Rights Act." 152 Cong. Rec. H5143-02 (daily ed. July 13, 2006).

The modest administrative burden on, and benefits for, Section 5 jurisdictions were important considerations to Congress, and particularly for those members representing covered jurisdictions. Congress passed the 2006 reauthorization with overwhelming bipartisan support; the bill received unanimous support in the Senate and the support of a substantial majority of members of the House of Representatives from the covered States as well. Indeed, in this case, among the covered jurisdictions, only the Governor of Georgia filed a brief in support of Appellant.[24]

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[24] In discussing bailout eligibility, *see* Br. at 22-24, Governor Perdue fails to acknowledge that, just five months ago, plaintiffs brought a successful Section 5 enforcement action against the State of Georgia for failing to submit its new voter registration data matching system for preclearance. *See Morales v. Handel*, No. 08-3172 (N.D. Ga. Oct. 27, 2008) (three-judge court).

* * *

The history of the Voting Rights Act, and the 2006 congressional record detailed above, offer powerful evidence of the continuing need for Section 5 to remedy and deter unconstitutional discrimination in covered jurisdictions.

II. In Reauthorizing Section 5, Congress Respected the Constitutional Balance Embodied in the Reconstruction Amendments and Reflected in *Boerne* and Its Progeny

City of Boerne v. Flores, 521 U.S. 507 (1997), and its progeny, like this Court's earlier precedents, recognize that the Reconstruction Amendments grant distinctive enforcement powers to Congress. *See id.* at 517-18; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (plurality opinion) (Congress's enforcement powers "include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations"). Thus, where Congress acts "within its sphere of power and responsibilities," *Boerne*, 521 U.S. at 535, it enjoys substantial latitude to fashion remedies, even when those remedies "intr[ude] into areas traditionally reserved to the States." *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (*citing City of Rome*, 466 U.S. at 179). Congress's broad enforcement powers, however, are not boundless. Rather, the Reconstruction Amendments create a discernible balance among the powers of Congress, those of the States, and those of this Court. *Boerne*, 521 U.S. at 522-24.

To achieve this important balance, this Court's precedents recognize that enforcement legislation may be set aside only if it substantively redefines or expands constitutional rights, such that it encroaches on powers reserved to the States or this Court. *Boerne*, 521 U.S. at 519-29 (citing, *inter alia*, *Oregon v. Mitchell*, 400 U.S. 112 (1970)); *see also Katzenbach*, 383 U.S. at 326. "The line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." *Boerne*, 521 U.S. at 519-20. To ensure that Congress does not exceed its broad authority, *Boerne* announced the congruence-and-proportionality test, which guides the determination of whether legislation is remedial (and valid) or substantive (and invalid). *Id.* at 519-20. Legislation satisfies the congruence-and-proportionality test unless it "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532.

The concern with the constitutional balancing reflected in *Boerne* explains why this Court consistently has pointed to Section 5 as an exemplar of remedial enforcement legislation. *See, e.g.*, *id.* at 530-33; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639, 640 (1999); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737-38 (2003); *id.* at 756-57 (Kennedy, J., dissenting). Unlike the statutes at issue in *Boerne* and its progeny, Section 5, consistent with the "pervading purpose" of the Reconstruction Amendments, is

designed to remedy racial discrimination. *Slaughter-House Cases*, 83 U.S. 36, 71 (1873); *see also Tennessee v. Lane*, 541 U.S. 509, 562-63 (2004) (Scalia, J., dissenting).

Moreover, when Section 5 was passed in 1965, as with every subsequent reauthorization, Congress, after careful examination, identified an existing pattern of purposeful discrimination in voting and decided to combat it with a measure designed to deter some of the worst problems. Congress has approached each reauthorization with knowledge of the Act's history, but directed its attention toward an assessment of whether ongoing voting discrimination in the covered jurisdictions warranted reauthorizing the Section 5 remedy. It is not permanent but it is designed to meet a grave constitutional harm.

Finally, in stark contrast to the legislative process underlying the Religious Freedom Restoration Act (the statute at issue in *Boerne*), during the 2006 reauthorization, Congress carefully considered this Court's rulings and drew upon them as it charted its legislative course. *See, e.g.*, *May 4, 2006 Hearing*, at 11-12, 23-24, 39, 54-55, 58; *May 16, 2006 Hearing*, at 4-5, 21, 44-45, 90, 94; *May 17, 2006 Hearing*, at 50-54, 65-70. As recognized in *Boerne*, Congress acts appropriately by so relying on this Court's precedents. *See* 521 U.S. at 536 ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.").

A. Appellant's Disagreements With Congress's Fact-finding and Predictive Judgments Do Not Undermine Section 5's Constitutionality

It is axiomatic that "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process," and that this Court affords deference to Congress's "predictive judgments." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997). Thus, this Court does not second-guess Congress's reasonable factual determinations or predictive judgments. Rather, the Court analyzes whether the evidentiary record permits the conclusion that Congress's legislation was responsive to a constitutional harm, such that the legislation is remedial and not substantive. *See Boerne*, 521 U.S. at 530-32.

Appellant does not seriously claim that the reauthorization of Section 5 involves the substantive redefinition of a constitutional right, which is the touchstone under *Boerne*. Instead, Appellant seeks to reopen numerous debates about the evidentiary record that were fully aired before, and reasonably resolved by, Congress. Among other issues considered and addressed during ten months of hearings described *supra*, Congress carefully considered each of the following:

- Some witnesses urged that circumstances in the covered jurisdictions no longer warrant the Section 5 remedy. *May 4, 2006 Hearing*, at 20; *May 17, 2006 Hearing*, at 207; *May 10, 2006 Hearing*, at 108. But the weight of the evidence before

Congress showed that many covered jurisdictions continue to show recalcitrance even 40 years following the adoption of a powerful prophylactic remedy; indeed, numerous jurisdictions persist in adopting new discriminatory voting laws even after prior laws have been invalidated under Section 5 or 2. *See* Part I, *supra*; *October 18, 2005 Hearing*, at 18; *June 21, 2006 Hearing*, at 130-34; *June 13, 2006 Hearing*, at 235; *March 8, 2006 Hearing*, at 1606-08.

- Similarly, Congress learned that, although the rate of DOJ objections has declined, the quantity and quality of continuing objections—not to mention Section 5 enforcement actions, MIRs, and Section 5's role in deterring jurisdictions from attempting to implement discriminatory voting regulations—demonstrates that Section 5 remains necessary to remedy widespread voting discrimination in covered jurisdictions. H.R. Rep. No. 109-478, at 21-25, 53; *March 8, 2006 Hearing*, at 177; Pub. L. No. 109-246 § 2(b)(4), (5).

- Members of Congress explicitly sought to determine whether Section 2, standing alone, was sufficient to combat voting discrimination, and they learned, based on statistical evidence and testimony of witnesses who had considerable experience with both provisions, that

Section 2 is an inadequate remedy in the covered jurisdictions. *See* H.R. Rep. No. 109-478, at 57; *May 16, 2006 Hearing*, at 61; *May 17, 2006 Hearing*, at 80.

- Congress also considered the effect of Section 5 on the covered jurisdictions. The evidence demonstrated that the statute's administrative burden is modest, and that Section 5 has important benefits for covered jurisdictions. *See* Part I. C, *supra*.

As demonstrated, the record shows that Congress's conclusions on each of these evidentiary matters were well-founded. Particularly in these circumstances, Appellant's request that this Court reweigh the evidence before Congress is inconsistent with *Boerne*. Instead, it is an improper invitation to displace and to fundamentally upset the constitutional balance that *Boerne* is intended to maintain. *See Boerne*, 521 U.S. at 519-29; *cf. Lane*, 541 U.S. at 558-63 (Scalia, J., dissenting).

B. The Reauthorized Section 5 Readily Passes Muster Under *Boerne*

In light of the foregoing discussion, a straightforward application of *Boerne*'s three-step analysis leads to the unmistakable conclusion that Section 5 remains appropriate enforcement legislation under the Fourteenth and Fifteenth Amendments. *See* J.S.App. 118-144.

Under *Boerne* step one (the nature of the constitutional right), Congress acted at the zenith of its enforcement powers in reauthorizing Section 5

because the statute is targeted at the intersection of a suspect classification (race) and a fundamental right (voting). J.S.App. 120-22. Unlike several of this Court's recent applications of *Boerne*, this is decidedly not a case where the Fourteenth Amendment acts as a vehicle for incorporating a rational-basis right through which Congress effectively redefines the substance of that right to prohibit a wide swath of state conduct. *See generally Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

Boerne step two considers the legislative record of deprivations of the constitutional rights in question. *See, e.g., Kimel*, 528 U.S. at 88-89; *see also* J.S.App. 124. As discussed in Part I.B, *supra*, Congress learned in 2006 that widespread unconstitutional discrimination against minority voters persists in the covered jurisdictions. This record of ongoing discrimination is of a wholly different magnitude than the records underlying each of the statutes this Court has analyzed (whether they were upheld or invalidated) under *Boerne* and its progeny. Indeed, as the District Court recognized, the 2006 record is filled with "evidence of the very kind of intentional discrimination the dissenters in *Hibbs* and *Lane* thought missing in those cases but present in *Katzenbach* and *City of Rome*." J.S.App. 127. The scope of the 2006 record (throughout Texas and the other covered jurisdictions) is all the more remarkable because, as discussed, Congress also learned that Section 5 deterred many covered jurisdictions from even attempting to implement discriminatory measures. In sum, consistent with its

"'historical experience'" in this area, *Boerne*, 521 U.S. at 525 (quoting *Katzenbach*, 383 U.S. at 308), Congress learned that racial discrimination remains both persistent and adaptive, such that Section 5's proactive remedy is still necessary.

Finally, under *Boerne* step three, Section 5 is congruent and proportional to ongoing deprivations of core constitutional rights in the covered jurisdictions. *See Boerne*, 521 U.S. at 520, 533. Section 5, as reauthorized, forbids intentionally (and thus unconstitutionally) discriminatory voting laws, as well as a subset of voting laws with a racially discriminatory effect (those that are retrogressive). These are reasonable responses to widespread evidence of unconstitutional conduct. *See United States v. Georgia*, 546 U.S. 151, 158 (2006) (unconstitutional discrimination); *Boerne*, 521 U.S. at 529 (effects discrimination) (citing, *inter alia*, *City of Rome*). Furthermore, as this Court has recognized, Section 5 includes numerous features—not present in other statutes addressed under *Boerne*—that minimize its breadth: Section 5 is geographically limited (with bail-out and bail-in provisions to expand or contract coverage as necessary); it affects a discrete class of state laws (those related to voting); and it has a termination date. *See, e.g.*, *Boerne*, 521 U.S. at 533. And, importantly, Section 5 does not include a private damages remedy. This ensures that lines of political accountability are clear and avoids the risk that Congress has enacted a benefit program rather than remedial legislation. *See Hibbs*, 538 U.S. at 744-45 (Kennedy, J., dissenting); *see also Alden v. Maine*, 527 U.S. 706, 751 (1999).

This is not to deny that Section 5's proactive remedy has federalism costs. The Reconstruction Amendments, however, permit the statute's "intrusion into areas traditionally reserved to the States" to address the grave problem of racial discrimination in voting. *Lopez*, 525 U.S. at 282-83 (citing *Katzenbach* and *City of Rome*). The only question raised by this case is whether, since its prior reauthorizations, Section 5 has become "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 532. The record of ongoing discrimination in the covered jurisdictions and the tailored nature of the remedy leave no doubt that Section 5 passes that test.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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APPELLEE'S BRIEF

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No. 08-322

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IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Whether a municipal utility district that does not register voters is a "political subdivision" eligible to invoke the bailout provision in Section 4(a) of the Voting Rights Act even though the Act's plain language limits such "political subdivision[s]" to counties, parishes, and entities "which conduct[] registration for voting."

2. Whether Congress acted within the scope of its enforcement powers under the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 of the Voting Rights Act in 2006, in light of an extensive legislative record of persistent unconstitutional discrimination against minority voters in covered jurisdictions and years of experience with the Act indicating that a failure to renew Section 5 would result in loss of advancements made in the elimination of discrimination against minority voters.

CORPORATE DISCLOSURE STATEMENT

The Austin Branch of the NAACP and the Texas State Conference of NAACP Branches are nongovernmental corporations. They have no parent corporations and no stock.

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STATEMENT OF THE CASE

The Voting Rights Act of 1965 is one of the most important civil rights measures in American history and is widely credited with giving force to the constitutional right of all citizens to vote free from racial discrimination. Appellant seeks to strike down Section 5, which this Court has aptly described as the very "heart" of the Act. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966). That would be a mistake of historic proportions.

Congress most recently reauthorized Section 5 in 2006 after holding more than 20 hearings and examining a record that exceeded 15,000 pages. With overwhelming support from both parties and from most of the jurisdictions that Section 5 covers, Congress concluded that, although Section 5 has accomplished much since its initial enactment in 1965, its protections remain necessary to safeguard existing gains and to finish breaking down centuries-old obstacles to political participation by racial minorities.

In this area, where Congress acts to remedy and deter official racial discrimination in the narrow context of voting rights, the Fifteenth Amendment grants Congress broad discretion to determine what enforcement mechanisms are most appropriate. Appellant, however, contends that Section 5 could have been validly reauthorized only if conditions in jurisdictions subject to its requirements were substantially the same now as they were in 1965. Put differently, Appellant believes that Congress could validly reauthorize enforcement legislation under the Fifteenth Amendment only if the legislation has been ineffective.

This Court should reject that argument, unsupported as it is by any authority, and instead should re-

affirm the constitutionality of this bedrock civil rights guarantee, as it has done on four prior occasions. Section 5's track record of *progress* does not mean that in those parts of the country, such as Appellant's home state of Texas, where discrimination has been most difficult to uproot, official racial discrimination in voting is now a thing of the past. Nor does it mean that there would no longer be a serious risk of backsliding in the absence of Section 5. To the contrary, the record before Congress in 2006 revealed that racial discrimination remains an ongoing and serious problem for minority voters in the covered jurisdictions. Congress acted well within its enforcement powers in reauthorizing Section 5 to preserve gains made thus far and to complete the task, set forth by the Fifteenth Amendment, of eliminating race discrimination in voting.

I. THE VOTING RIGHTS ACT

A. The Origins Of The Voting Rights Act

In the aftermath of the Civil War, Congress proposed and the States ratified three constitutional amendments to ensure that former slaves and their descendants would take their rightful place as full and equal citizens. In 1865, the Thirteenth Amendment ended the long and shameful history of legalized slavery in the United States. Three years later, the States ratified the Fourteenth Amendment, which included a guarantee that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The "sentiment ... soon came to prevail ... that the ballot was absolutely essential to [the freedmen's] protection against oppression and wrong in a thousand forms where the general law would be powerless," 2 Joseph Story, *Commentaries on the Constitution of the United States* 688 (4th ed. 1873),

and that the Fourteenth Amendment might not itself suffice for that task. Congress thus proposed the Fifteenth Amendment, which the States ratified in 1870. The Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Section 2 of the Amendment gives Congress the "power to enforce this article by appropriate legislation." *Id.* § 2.

Despite the Fifteenth Amendment's passage, many States and local governments—particularly those in the former Confederacy—devised numerous methods for denying the franchise to racial minorities. "These included grandfather clauses, property qualifications, 'good character' tests," white primaries, literacy tests, racial gerrymanders, and interpretation requirements. *Katzenbach*, 383 U.S. at 311. As a result, African-American voting rates in the former Confederate States dropped precipitously. *See, e.g.*, *Louisiana* v. *United States*, 380 U.S. 145, 147-149 (1965) (noting that beginning with the adoption of the Louisiana Constitution of 1898, the State implemented a policy of denying African-American citizens the right to vote such that from 1898 to 1944, the percentage of registered African-American voters declined from 44% to 0.2%); *United States* v. *Mississippi*, 380 U.S. 128, 144 (1965).

After nearly a century of such disenfranchisement, Congress enacted a series of statutes—the Civil Rights Acts of 1957, 1960, and 1964—each of which sought to "facilitat[e] case-by-case litigation" against voting discrimination. *Katzenbach*, 383 U.S. at 313. But this approach proved unequal to the task of "solv[ing] the voting discrimination problem." S. Rep. No. 89-162, pt. 3, at 6 (1965). As this Court observed: "Voting suits are

unusually onerous to prepare .... Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved[.]" *Katzenbach*, 383 U.S. at 314.

In response, Congress decided to implement "sterner and more elaborate measures," *Katzenbach*, 383 U.S. at 309, "aimed at areas where voting discrimination ha[d] been most flagrant," *id.* at 315. The result was the passage of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, codified as amended at 42 U.S.C. §§ 1973 *et seq.* (VRA or Act).

B. The Operation Of Section 5

1. Section 5's preclearance rules

Jurisdictions covered by Section 5 may not implement any change in a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," 42 U.S.C. § 1973c(a), without obtaining "preclearance." Preclearance may be obtained in either of two ways. First, a jurisdiction may file a declaratory judgment action in the United States District Court for the District of Columbia. *Id.* Second, as a more expeditious alternative, a jurisdiction may submit the proposed change to the Department of Justice for administrative preclearance. *Id.*; *see generally* 28 C.F.R. §§ 51.1 *et seq.* DOJ must interpose any objection to a proposed voting change within a sharply limited time period—60 days after a submission is completed—or else the proposed change is deemed precleared. *See* 42 U.S.C. § 1973c(a); 28 C.F.R. §§ 51.1(a)(2), 51.9, 51.37, 51.39. In either forum, the jurisdiction must show that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or on account of language

minority status. Until the proposed change is precleared, it is unenforceable. *See* 28 C.F.R. § 51.1(a).[1]

2. Scope of Section 5 coverage

Section 5 applies to jurisdictions with particularly egregious histories of, and ongoing problems with, racial discrimination in voting. Section 5's coverage extends both to some States as a whole and, in a few States that are not themselves covered, to designated "political subdivisions" of those States. Section 14(c)(2) of the Act defines a "political subdivision" as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. § 1973*l*(c)(2). If a State or political subdivision is covered, then all governmental subunits within the jurisdiction are generally subject to the preclearance requirements. 28 C.F.R. § 51.6. Under the coverage formula,[2] the jurisdictions covered include

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[1] Section 5 is part of a complex statutory scheme designed to "banish the blight of racial discrimination in voting." *Katzenbach*, 383 U.S. at 308. The scheme includes, among other provisions, Section 2 of the VRA, 42 U.S.C. § 1973, which contains the Act's nationwide prohibition on voting discrimination. The various provisions work in tandem. Thus, for example, when a Section 5 covered jurisdiction is required to change its method of election as a result of Section 2 litigation, Section 5 ensures that the jurisdiction cannot undo minority electoral progress through subsequent voting changes.

[2] Under the statutory coverage formula for Section 5, a jurisdiction is covered if, at the time of the 1964, 1968, or 1972 presidential election, (1) the jurisdiction maintained a "test or device" for voting or registration, and (2) the jurisdiction had less than a 50% voter registration rate or fewer than 50% of the eligible population

nine States—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia—and one or more political subdivisions in seven States—California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. *See id.* pt. 51 app. In the remaining thirty-four States, there are no covered jurisdictions.

3. Adjustments to coverage

Although Congress devised Section 5's coverage formula to reach those jurisdictions with the most egregious voting-related discrimination problems, it also recognized the need for flexibility in the Act's coverage, in part to give covered jurisdictions an incentive to protect minority voting rights. To alleviate over-inclusiveness, Congress provided a "procedure for exemption from" Section 5's preclearance obligations: the "so-called 'bailout' provision." *City of Rome* v. *United States*, 446 U.S. 156, 167 (1980). A State or political subdivision may "bail out" by establishing that it satisfies certain criteria set forth at 42 U.S.C. § 1973b(a)(1). Under the current bailout provision (in place since the 1982 amendments took effect), every one of the fourteen jurisdictions that has applied has, with the Attorney General's support, successfully secured bailout. J.S. App. 140.

Congress also included a provision to address under-inclusiveness. Under the "bail-in" provision, a

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actually voted in the presidential election. 42 U.S.C. § 1973b(b). In 1975, Congress expanded Section 5 to include jurisdictions with a history of voting discrimination against "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage." *Id.* § 1973*l*(c)(3).

court may subject a non-covered jurisdiction to preclearance requirements if the court finds "that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred" within that jurisdiction. 42 U.S.C. § 1973a(c); *see, e.g.*, *Jeffers* v. *Clinton*, 740 F. Supp. 585, 599-601 (E.D. Ark. 1990).

C. This Court's Prior Decisions Sustaining Section 5 As Initially Enacted And As Reauthorized

This Court has repeatedly sustained Section 5's constitutionality, upholding it as initially enacted and after each of the three reauthorizations prior to 2006.

After Congress enacted the VRA in 1965, South Carolina, supported by Alabama, Georgia, Louisiana, Mississippi, and Virginia, immediately challenged the Act, arguing that Congress had exceeded its Fifteenth Amendment enforcement powers. *See Katzenbach*, 383 U.S. at 307-308 & n.2. This Court rejected the States' challenge, holding that the sections of the Act before it, including Section 5, were "an appropriate means for carrying out Congress' constitutional responsibilities and [we]re consonant with all other provisions of the Constitution." *Id.* at 308. The Court concluded that Section 5 was justified by the particularly egregious history and firmly rooted practice of voting discrimination in covered jurisdictions. *See id.* at 329-331, 334-335.

Following the "dramatic rise in registration" after the Act's 1965 passage, "a broad array of dilution schemes were employed to cancel the impact of the new black vote." S. Rep. No. 97-417, at 6 (1982). "Their common purpose and effect [was] to offset the gains made at the ballot box under the Act." *Id.* Against this backdrop, Congress reauthorized Section 5 in 1970. In

a challenge brought after the 1970 reauthorization, this Court "reaffirm[ed]" that Section 5 "is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment." *Georgia* v. *United States*, 411 U.S. 526, 535 (1973).

In 1975, following additional hearings, Congress determined "that it is largely Section 5 which has contributed to the gains thus far achieved in minority political participation, and it is likewise Section 5 which serves to insure that that progress not be destroyed through new procedures and techniques." H.R. Rep. No. 94-196, at 11 (1975); *see also* S. Rep. No. 94-295, at 19 (1975) (same). In addition to reauthorizing the Act's temporary provisions, Congress extended the VRA's coverage to protect Latinos, Native Americans, and Asian Americans (referred to collectively in the Act as language minorities), concluding "after extensive hearings that there was 'overwhelming evidence' showing 'the ingenuity and prevalence of discriminatory practices that have been used to dilute the voting strength and otherwise affect the voting rights of language minorities.'" *Briscoe* v. *Bell*, 432 U.S. 404, 405-406 (1977) (citations omitted); *see also* S. Rep. No. 94-295, at 25-27. Texas (and all of its governmental subunits) became covered under Section 5 as a result of the language-minority amendment. *See* Bureau of the Census, *Voting Rights Act Amendments of 1975*, 40 Fed. Reg. 43,746, 43,746 (Sept. 23, 1975).

After the 1975 reauthorization, the City of Rome, Georgia, challenged Section 5's constitutionality. *See Rome*, 446 U.S. 156. This Court again sustained Section 5's constitutionality, holding that viewed in light of "95 years of pervasive voting discrimination" and the evidence of ongoing voting discrimination against racial minorities, "the Act ... was plainly a constitutional

method of enforcing the Fifteenth Amendment." *Id.* at 180-182.

In 1982, Congress again conducted an in-depth examination of whether Section 5 should be renewed. The extensive record it compiled reflected that "discrimination continues today to affect the ability of minorities to participate effectively within the political process." H.R. Rep. No. 97-227, at 11 (1981). Congress reauthorized Section 5, and in *Lopez* v. *Monterey County*, 525 U.S. 266, 282-285 (1999), this Court once more reaffirmed Section 5's constitutionality.

D. The 2006 Reauthorization

In 2005 and 2006, against the backdrop of this Court's decisions sustaining Section 5's constitutionality, Congress considered whether to reauthorize the Act's temporary provisions, including Section 5, which were scheduled to expire in 2007. The House held 12 hearings on the subject and received oral testimony from 46 witnesses, written testimony from DOJ and other organizations and witnesses, and 13 extensive reports analyzing voting-related discrimination over the previous 25 years. H.R. Rep. No. 109-478, at 5 (2006). The Senate also conducted an extensive investigation, holding nine hearings and considering the testimony of 46 witnesses. S. Rep. No. 109-295, at 10 (2006). In total, Congress compiled a record "of over 15,000 pages." *Id.*

Following its examination of the record, Congress found that "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by mi-

norities in the last 40 years." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(9), 120 Stat. 577, 578 (VRARA). The evidence revealed, for example, "that more Section 5 objections were lodged between 1982 and 2004 than were interposed between 1965 and 1982 and that such objections did not encompass minor inadvertent changes. The changes sought by covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process." H.R. Rep. No. 109-478, at 21; *see also id.* at 36-40.

Other evidence relied on by Congress included (1) the volume of preclearance requests that were withdrawn after DOJ sent the submitting jurisdiction a "more information request," (2) Section 5 enforcement actions by DOJ and private plaintiffs in covered jurisdictions, (3) declaratory judgment requests for preclearance that were denied, (4) continued Section 2 violations and litigation in covered jurisdictions, (5) DOJ lawsuits to enforce Section 203 of the Act, which mandates language assistance in voting, (6) the "continued evidence of racially polarized voting in each of the [covered] jurisdictions," (7) the continued need for federal election observers in several covered jurisdictions, (8) racial disparities in registration rates, and (9) uneven and disproportionately low number of minority elected officials. *See* Pub. L. No. 109-246, § 2(b)(3), (4), (5), 120 Stat. at 577-578; H.R. Rep. No. 109-478, at 25-36, 40-53. Congress also found that Section 5 has been a "vital prophylactic tool[]" that has "deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, at 21, 24.

During the 2006 legislative deliberations, a coalition of state and local government organizations repre-

senting thousands of jurisdictions, including covered jurisdictions, urged Congress to reauthorize the Act's temporary provisions. These jurisdictions explained that, "[w]hile substantial progress has been made since passage of the Voting Rights Act in 1965, it has not yet resulted in the elimination of voting discrimination." 152 Cong. Rec. H5143, H5146 (daily ed. July 13, 2006) (Letter from Council of State Governments, National Conference of State Legislatures, National Association of Secretaries of State, National Association of Counties, National League of Cities, and U.S. Conference of Mayors). Over the course of the entire reauthorization process, not a single witness representing a covered jurisdiction testified against reauthorizing Section 5.

In the vote on the VRARA, Section 5's reauthorization likewise received decisive bipartisan support, including widespread support from delegations representing States covered by Section 5. The Senate passed the VRARA unanimously. 152 Cong. Rec. S7949, S8012 (daily ed. July 20, 2006). House members from fully-covered States voted 68 to 18 in favor of reauthorization, and House members from partially-covered States voted likewise 128 to 8. *See* 152 Cong. Rec. H5143, at H5207. The full vote in the House was 390 to 33. *Id.*

On July 27, 2006, President George W. Bush signed the VRARA into law.

II. PROCEDURAL HISTORY

Appellant Northwest Austin Municipal Utility District Number One is a local governmental entity in Travis County, Texas. Appellant is governed by a Board of Directors elected by qualified voters residing within its borders. Since Appellant's formation in the

1980s, Travis County has conducted all voter registration of individuals who reside within the utility district. J.S. App. 18, 22.

Eight days after the VRARA became law, Appellant filed this suit, seeking either a bailout from Section 5 coverage or, in the alternative, a declaration that Section 5 as reauthorized in 2006 exceeds Congress's constitutional enforcement powers because it fails the congruence-and-proportionality standard described in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).[3] J.S. App. 19. Travis County, eleven individuals resident in the utility district, three individuals resident elsewhere in Texas, and three civil rights organizations intervened as defendants. J.S. App. 19-20. A three-judge panel of the United States District Court for the District of Columbia heard the case.

The district court granted the Attorney General's and the intervenors' motions for summary judgment and denied Appellant's cross-motion. The court first held that Appellant may not bail out because only States and "political subdivisions" are eligible to seek bailout and Appellant is not a political subdivision. The court held that Section 14(c)(2) of the Act defines the term "political subdivision" and encompasses only counties, parishes, and other subdivisions within a

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[3] The *Boerne* framework requires a reviewing court to engage in three inquiries. First, the Court must identify the constitutional right or rights that Congress sought to enforce by enacting the legislation in question. *See Tennessee* v. *Lane*, 541 U.S. 509, 522 (2004). Second, the Court must examine the "gravity of the harm [the legislation] seeks to prevent." *Id.* at 523. Third, the Court must determine whether the statute in question is "an appropriate response" to the harms identified. *Id.* at 530.

State that—unlike Appellant—register voters. J.S. App. 20-30.

The district court also rejected Appellant's constitutional challenge. The court concluded that under *Katzenbach* and later cases considering the VRA's constitutionality, the appropriate inquiry for the courts is whether Section 5's reauthorization was a "'rational means to effectuate the constitutional prohibition of racial discrimination in voting,'" (J.S. App. 35 (quoting *Katzenbach*, 383 U.S. at 324)), instead of the congruence-and-proportionality analysis applied in *Boerne* to legislation enacted under the Fourteenth Amendment. J.S. App. 45-56. The court nonetheless evaluated Section 5 as reauthorized in the VRARA under both the *Katzenbach* standard and the congruence-and-proportionality test, holding that under either standard, Section 5 remains constitutional. J.S. App. 2, 122, 124-128, 133-134.

SUMMARY OF ARGUMENT

I. Appellant is ineligible for bailout because it is not a "political subdivision" within the meaning of the bailout provision contained in Section 4(a) of the Act. "Political subdivision" is defined in Section 14(c)(2) of the Act as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. § 1973*l*(c)(2). That definition applies to the use of the term in Section 4(a), as this Court confirmed in *Rome*. Appellant's contrary interpretation would give rise to a host of anomalies: It would render surplusage an important clause Congress included in Section 4(a); it would give the term two different meanings within this single statutory provision;

it would strip the term "governmental unit" (used in Section 4(a)) of any independent meaning; and it would arbitrarily confer bailout eligibility on municipalities, school districts, and special purpose districts within covered States, but not on those within covered counties in non-covered States.

II. This Court's decisions over the last four decades, taken together with the 2006 reauthorization's extensive legislative record, confirm that Section 5 remains constitutional.

The Court has sustained Section 5's constitutionality four times, including as recently as a decade ago. In each case—*Katzenbach*, *Georgia*, *Rome*, and *Lopez*—the Court has deferentially reviewed Congress's judgment that Section 5 is needed to protect minority voters in the covered jurisdictions—those with an entrenched history of discrimination in voting. *Stare decisis* considerations weigh decisively in favor of similar respect for Congress's judgment here, particularly since, in 2006, Congress reauthorized this provision on the understanding that this Court has repeatedly found it constitutional. And far from displacing this precedent, *Boerne* and its progeny repeatedly cite Section 5 as the paradigm of valid enforcement legislation under the Civil War Amendments.

A strong presumption that Section 5 remains constitutional is further warranted because Section 5 targets the evil that the Fifteenth Amendment clearly gives Congress power to prevent: official racial discrimination in the specific context of voting. Congress's authority to fashion remedies is at its zenith in a case, such as this one, where the legislation seeks both (1) to eliminate discrimination based on the most suspect factor in American jurisprudence (race) and (2) to vindi-

cate the most fundamental civil right (the franchise). Section 5 thus does not implicate the concern animating the Court's use of a more skeptical review in *Boerne* and some subsequent cases—the danger that Congress might try to redefine one of the many rights of potentially broad application that the Fourteenth Amendment makes directly applicable to, or incorporates against, the States. *Boerne* itself, for example, reflected this Court's express concern that Congress was attempting to re-impose, through legislation, a broad interpretation of the Free Exercise Clause that the Court had recently rejected. No comparable concern is presented here.

On the merits, and under any standard of review, the massive record before Congress in 2006 justified Congress's reauthorization of Section 5. The record reveals that, although much progress has undeniably been made since 1965, official discrimination in voting persists in the covered jurisdictions. Hundreds of DOJ objections (including many on the basis of discriminatory intent), lagging minority electoral representation in the covered jurisdictions, ongoing racial disparities in voting, and a wide variety of other categories of evidence all provided more than an ample basis for Congress's considered judgment that Section 5's prophylactic rules remain necessary in Texas and the other covered jurisdictions.[4]

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[4] We fully concur in the brief for the Louis Intervenors, which covers this legislative record in persuasive detail.

ARGUMENT

I. APPELLANT IS NOT ELIGIBLE FOR BAILOUT

A. The Statute's Text, Structure, And Legislative History Show Appellant Is Ineligible For Bailout

As originally enacted, the VRA allowed only covered States or separately covered political subdivisions in non-covered States to bail out from Section 5. In *Rome*, this Court upheld that arrangement, concluding that Section 5 was constitutional even though the statute at the time did not allow any governmental units within a fully covered State to apply for bailout. 446 U.S. 156, 167 (1980). The Court rejected an argument, advanced by Justice Powell in dissent, that Section 5 would be constitutional only if every governmental subunit within a covered State that was required to preclear its voting changes were eligible for bailout. *Id.* at 203 (Powell, J., dissenting).

During the 1982 reauthorization, Congress decided to expand the number of jurisdictions eligible to seek bailout. Nonetheless, Congress decided to limit eligibility to States and "political subdivisions," whether or not separately covered. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(2), 96 Stat. 131; 42 U.S.C. § 1973b(a)(1)(A)-(D), (F) & (3)-(4). Appellant is not a State, and as explained below, it is also not a "political subdivision" under the statute.

"[P]olitical subdivision" is defined in Section 14(c)(2) of the Act as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. § 1973*l*(c)(2). Because Appellant is neither a county nor a parish, and

because Travis County conducts voter registration for Appellant, Appellant is not a "political subdivision" under the plain language of Section 14. Given this statutory definition, Appellant's reliance on dictionaries and other interpretive sources (Br. 16-17) is misplaced. *See Rowland* v. *California Men's Colony*, 506 U.S. 194, 200 (1993). The legislatively provided definition must apply throughout the statute, *see id.*, except in those instances where there is some clear indication to the contrary, *see Smith* v. *Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 592-593 (9th Cir. 1997) (noting that statutory purpose and legislative history make clear Congress did not intend Section 14(c)(2)'s definition of political subdivision to apply to Section 2 of the VRA).

The structure of the bailout provision, along with its legislative history, confirms that Section 14(c)(2)'s definition of political subdivision applies in the bailout context. As the district court noted, Appellant's interpretation of the term "political subdivision" in Section 4(a) would render part of that subsection surplusage. J.S. App. 24-25. Section 4(a) confers bailout eligibility on "any political subdivision of [a covered] State ... *though [coverage] determinations were not made with respect to such subdivision as a separate unit.*" 42 U.S.C. § 1973b(a)(1) (emphasis added). The clear import of the second clause is to extend bailout eligibility not just to separately covered "political subdivisions" of *non*-covered States, but also to non-separately-covered "political subdivisions" of *covered* States—and no further. Had Congress intended to make all of a jurisdiction's political subunits eligible for bailout, it could easily have drafted the provision to say so, and there would have been no need for Congress to specify that a

jurisdiction need not have been separately designated for coverage in order to bail out.

Further, Appellant's interpretation would anomalously give the phrase "political subdivision" two different meanings in Section 4(a). That provision uses the phrase "political subdivision" twice: first, as noted above, in providing that political subdivisions not separately covered may bail out, and second, in stating that "political subdivisions" that have been separately covered are eligible to bail out. 42 U.S.C. § 1973b(a)(1). But since only jurisdictions that meet Section 14(c)(2)'s definition can be separately covered, the second usage of "political subdivision" must refer only to counties, parishes, and political subunits that register voters. And a term that appears twice in a single statutory provision should be construed, if possible, to have one meaning rather than two. *See Wisconsin Dep't. of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 225 (1992). Here, that requires application of the Section 14(c)(2) definition to Section 4(a) both times "political subdivision" appears in that provision.

Moreover, Section 4(a) refers to a "State or political subdivision and all governmental units within its territory." 42 U.S.C. § 1973b(a)(1)(D), (F). If possible, independent meaning should be given to the phrase "governmental units," which Congress clearly perceived as distinct from "political subdivision[s]." The district court's reading gives that term independent meaning by recognizing that there are "governmental units," like Appellant, *within* "political subdivisions" that must preclear voting changes, but are not themselves eligible for bailout. Appellant, having given the phrase "political subdivision" two different meanings, would give the term "governmental unit" no distinct meaning at all.

Finally, Appellant's interpretation would also create a jarring practical anomaly in the application of the bailout provision. Section 4(a) permits bailout for "political subdivisions" of *States*, but not for any entity falling *within separately covered "political subdivisions."* Thus, under Appellant's reading, a municipal utility district in Texas could bail out of Section 5 coverage, but a similar special purpose district in a separately covered county in a non-covered State like California could not. There is no reason to believe that Congress created such an arbitrary regime.

The legislative history of the 1982 reauthorization further confirms that Section 14(c)(2)'s definition applies to bailout. The 1981 House Report states that the "standard for bail-out is broadened to permit political subdivisions, *as defined in Section 14(c)(2)* ... to bail out although the state itself may remain covered." H.R. Rep. No. 97-227, at 2 (1981) (emphasis added); *see also id.* at 39. The Senate Report not only contains similar language, S. Rep. No. 97-417, at 2, 69 (1982), but also specifically explains this limitation as a "logistical limit." As that Report explains, if every sub-county level political subunit were eligible to seek separate bailout, "we could not expect that the Justice Department or private groups could remotely hope to monitor and defend the bailout suits." *Id.* at 57 n.192. The Senate Report adds that "[f]ew questioned the reasonableness and fairness of this cutoff in the House." *Id.*

The legislative history of the 2006 reauthorization confirms the same conclusion. After two witnesses testified that Congress should expand the scope of the bailout provision to include entities other than political subdivisions, Congress made no changes to that provision. J.S. App. 28. Moreover, the 2006 reauthorization came against the backdrop of longstanding DOJ regula-

tions, *see* Department of Justice *Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 52 Fed. Reg. 486, 491 (Jan. 6, 1987) (codified at 28 C.F.R. §§ 51.2, 51.5), that specifically provide that only "[p]olitical subdivision[s]" as defined in Section 14(c)(2) may seek to bail out from Section 5 coverage. The text, structure, and legislative history of the Act thus clearly point to the conclusion that Appellant is not an entity independently eligible for bailout. Of course, Appellant's preclearance obligations would end if either Texas or Travis County successfully bailed out of coverage.

B. Appellant's Remaining Arguments Are Foreclosed By *Rome*

Appellant argues (Br. 18-20) that language in *United States* v. *Board of Commissioners of Sheffield*, 435 U.S. 110, 130 n.18 (1978), and *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 43-44 (1978), suggests that the only purpose of the definition of "political subdivision" in Section 14 of the Act is to specify which jurisdictions may be covered under Section 5 separately from their States—not to identify those entities that are eligible for bailout. That is incorrect. As this Court explained in *Rome*, "*Sheffield* ... did *not* hold that cities [that do not register voters] are 'political subdivisions' under §§ 4 and 5." 446 U.S. at 168 (emphasis added). Indeed, *Sheffield* "did not even discuss the bailout process." *Id.* *Dougherty County* likewise did not address bailout. Rather, both *Sheffield* and *Dougherty County* concerned the reach of Section 5's preclearance requirement and made clear that governmental subunits within covered States are subject to that requirement because they lie within those States, not because they fall within the definition of "political

subdivision" in Section 14(c)(2). In contrast, the Court *did* address the scope of bailout in *Rome*. The Court relied on the statutory definition in Section 14(c)(2) and reasoned that, "under the express statutory language," the City of Rome was "not a 'political subdivision' for purposes of § 4(a) 'bailout.'" *Id.*

As noted, the 1982 reauthorization—which post-dated *Sheffield*, *Dougherty County*, and *Rome*—expanded bailout to reach "political subdivisions" within *covered* States (and not just those within non-covered States). *See* Pub. L. No. 97-205, 96 Stat. 131. But it left unaltered *Rome*'s approach to defining "political subdivision" in the bailout provision. It certainly does not follow from Congress's decision to extend bailout eligibility that Congress meant to extend the term "political subdivision" far beyond the express statutory definition, as Appellant contends. J.S. App. 23-25, 30. Indeed, since *Rome* had already made clear that *Sheffield* does not govern bailout, Congress had no need to explicitly "incorporate §14(c)(2)'s restrictive definition" (Br. 21) in the bailout provision itself to make clear that this statutory definition controls.[5]

Appellant also claims (Br. 26) that the district court's interpretation of bailout "interferes with and reorders" Texas state government. That argument lacks merit. Before 1982, a subunit's preclearance obligations could be terminated only if a bailout was independently obtained by the State (or separately covered political subdivision) in which the subunit was located.

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[5] Because Appellant fails to show that *Sheffield* or *Dougherty County* raises any ambiguity as to the scope of bailout eligibility, the canon of constitutional avoidance has no application. *See Clark v. Martinez*, 543 U.S. 371, 385 (2005).

This Court upheld that arrangement as constitutional in *Rome*. 446 U.S. at 167. In 1982, Congress *expanded* bailout eligibility to jurisdictions that had not previously been eligible (while nonetheless limiting eligibility to States, counties, parishes, and other entities that register voters). That expansion of eligibility does not raise federalism concerns—if anything, it eases them. Accordingly, Appellant's statutory argument should be rejected.

II. SECTION 5 REMAINS CONSTITUTIONAL

A. Under The Court's Precedents, A Deferential Standard Governs Judicial Review Of Congress's Decision To Reauthorize Section 5

1. *Stare decisis* considerations weigh decisively in favor of deferential review

"When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997). This Court's prior decisions upholding Congress's original enactment and later reauthorizations of Section 5 have consistently applied a deferential standard of review in evaluating whether the statute falls within the scope of Congress's enforcement authority under Section 2 of the Fifteenth Amendment. The Court should follow a similar approach here.

After Congress enacted the VRA, South Carolina argued that the Act, including Section 5, exceeded Congress's powers. *South Carolina* v. *Katzenbach*, 383

U.S. 301, 323 (1966). The Court rejected that challenge. It observed that under the Fifteenth Amendment, Congress has "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting," *id.* at 326, and that the "Fifteenth Amendment supersedes contrary exertions of state power," *id.* at 325. The Court explained that the States' ordinary plenary authority over matters "'wholly within the domain of state interest'" is qualified when state power has been "'used as an instrument for circumventing a federally protected right.'" *Id.* (quoting *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960)).

Assessing whether "Congress [had] exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States," *Katzenbach*, 383 U.S. at 324, the Court stated that the "ground rules" for resolving the question were "clear.... As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* The Court explained that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in ... cases" involving legislation under the Necessary and Proper Clause, and that "Chief Justice Marshall laid down the classic formulation" of that test in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), "50 years before the Fifteenth Amendment was ratified." 383 U.S. at 326. Specifically, "'[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'" *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421). As the Court had explained the previous Term, the Necessary and Proper Clause authorizes

congressional action when "legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary." *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964).[6]

In its application of this "rational means" standard, the Court in *South Carolina* v. *Katzenbach*, 383 U.S. at 308, explained that "[t]he constitutional propriety of the Voting Rights Act ... must be judged with reference to the historical experience which it reflects." And the Court concluded that Congress's enactment of Section 5 was justified by the exceptional history of voting-related racial discrimination in the covered jurisdictions. *Id.* at 309-315, 329-331, 334-335. The Court held that the coverage formula was "rational," *id.* at 330, and sustained Section 5's statutory preclearance rules as appropriate enforcement legislation, *id.* at 334-335.

In its later decisions addressing the validity of Section 5 as reauthorized, the Court has reaffirmed both Section 5's constitutionality and the deferential review standard set forth in *South Carolina* v. *Katzenbach*. First, after the 1970 reauthorization, the Court held in *Georgia* v. *United States*, 411 U.S. 526, 535 (1973), that "for the reasons stated" in *Katzenbach*, the "Act [was] a permissible exercise of congressional power under § 2 of the Fifteenth Amendment."

The Court followed the same approach when, after Congress reauthorized the VRA in 1975, the City of

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[6] *See also Tennessee* v. *Lane*, 541 U.S. 509, 555 (2004) (Scalia, J., dissenting) (describing the "necessary and proper" standard as "flexible"); *Lopez* v. *Monterey County*, 525 U.S. 266, 294 (1999) (Thomas, J., dissenting) (describing Congress's authority under the Necessary and Proper Clause as "broad").

Rome, Georgia, brought another challenge to Section 5. The City argued that the VRA exceeded Congress's Fifteenth Amendment enforcement power in two key respects. First, it argued that the Act unconstitutionally prohibited voting practices that were only discriminatory *in effect* and therefore impermissibly expanded the Amendment's prohibition against *purposeful* racial discrimination in voting. *Rome*, 446 U.S. at 173. Second, the City argued that the Act violated principles of federalism. *Id.* at 178.

The *Rome* Court rejected both challenges. Again invoking the *Katzenbach* "any rational means" and *McCulloch* "necessary and proper" standards, *Rome*, 446 U.S. at 175, 177, the Court reasoned that Congress had acted "rationally" and therefore "appropriate[ly]" by prohibiting jurisdictions with a past history of purposeful voting discrimination from implementing voting changes with even a discriminatory impact, *id.* at 177. The Court relied for that conclusion in part on *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), which had unanimously upheld a provision of the VRA imposing a nationwide ban on literacy tests whether or not a given test was imposed for a discriminatory purpose.[7] Turning to the

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[7] In *Mitchell*, the Court held that, even though the use of such tests without a discriminatory intent had been held not to violate the Fifteenth Amendment, Congress could "rationally have determined" that a ban on all literacy tests was an "appropriate method[] of attacking the perpetuation of past purposeful racial discrimination" in voting. *Rome*, 446 U.S. at 176 (citing various opinions in *Mitchell*). Except for Justice Douglas, who believed that the legislation was authorized under Section 5 of the Fourteenth Amendment, *see Mitchell*, 400 U.S. at 144-147 (opinion of Douglas, J.), every member of the Court in *Mitchell* agreed that Congress had permissibly acted under its Fifteenth Amendment enforcement authority, *see id.* at 132-133 (opinion of Black, J.); *id.*

City's federalism challenge, the Court in *Rome* reaffirmed its holding in *Katzenbach* that "'the Fifteenth Amendment supersedes contrary exertions of state power.'" 446 U.S. at 180 (quoting *Katzenbach*, 383 U.S. at 325). Applying that principle, the Court concluded that "Congress had the authority to regulate state and local voting through the provisions of the Voting Rights Act," *id.* at 179, and that the Act was "'an appropriate means for carrying out Congress' constitutional responsibilities,'" *id.* at 179-180 (quoting *Katzenbach*, 383 U.S. at 308).

Following the 1982 reauthorization and shortly after its *Boerne* decision, this Court again sustained Section 5's constitutionality, holding in *Lopez* v. *Monterey County*, 525 U.S. 266, 283 (1999), that Section 5 is appropriate enforcement legislation that does not "usurp[] powers reserved to the States." The Court invoked *Katzenbach* and *Rome* to support its conclusion that Congress acted within its "authority under the Fifteenth Amendment" in requiring federal preclearance of the implementation of a voting change by a covered county in a non-covered State—even where the county's action was "nondiscretionary" under state law. *Id.* at 282.

Appellant does not contend that the Court's *Boerne* cases overrule *Katzenbach* and its progeny, nor could it credibly do so. Nor has *Boerne* displaced or altered *Katzenbach*'s approach for evaluating whether Section 5 is appropriate enforcement legislation. To the contrary,

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at 216 (opinion of Harlan, J.); *id.* at 232-234 (opinion of Brennan, White, and Marshall, JJ.); *id.* at 284 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.); *see also Rome*, 446 U.S. at 177 n.13.

the Court's *Boerne* cases have consistently embraced *Katzenbach* and *Rome* and pointed to Section 5 as a model of the proper use of congressional enforcement powers. In *Boerne* itself, the Court cited the VRA, including specifically Section 5, as the leading example of valid enforcement legislation. 521 U.S. at 525-527. And the Court's decisions following *Boerne* have similarly extolled Section 5 as a proper exercise of congressional enforcement authority, distinguishing Section 5 from various statutes held invalid. *See Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639-640 (1999); *United States* v. *Morrison*, 529 U.S. 598, 626 (2000); *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 536, 373-374 (2001).

This unbroken line of authority—from *Katzenbach* to the Court's three later decisions directly sustaining Section 5 as reauthorized, through the *Boerne* decisions' reaffirmance of those precedents—refutes any suggestion that *Katzenbach* or *Rome* or their analytical framework have lost their force.[8] Adherence to that

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[8] Contrary to the suggestions of Appellant and its amici (Br. 27-28; Pacific Legal Foundation Amicus Br. 6-19; Mountain States Legal Foundation Amicus Br. 5-6, 10-20), the Court has never held that the *Boerne* test applies to all Fifteenth Amendment enforcement legislation. In support of this contention, Appellant and its amici note the Court's observations in certain *Boerne* decisions that the enforcement clauses of the Fourteenth and Fifteenth Amendments are "parallel," *Boerne*, 521 U.S. at 518, and "virtually identical," *Garrett*, 531 U.S. at 373, n.8. *See, e.g.*, Br. 28; Mountain States Legal Foundation Amicus Br. 5-6. The Court, however, made these observations in Fourteenth Amendment, not Fifteenth Amendment, cases. And it did so by way of demonstrating (1) the breadth, not the narrowness, of Congress's Fifteenth Amendment enforcement authority, *see Boerne*, 521 U.S. at 518 (under the Fifteenth Amendment, as under the Fourteenth, "[l]egislation ... can fall within the sweep of Congress' enforcement power even if ... it

framework is particularly warranted here because, in 2006, Congress legislated on the premise that the Court would continue to apply that framework.

2. Reauthorization of Section 5 involved a quintessentially legislative judgment about how to protect fundamental constitutional rights

Through the VRA, Congress has targeted official racial discrimination in voting, conduct at the heart of the Fifteenth Amendment's proscriptions. Above and beyond *stare decisis* considerations, applying the standard utilized in *Katzenbach* and *Rome* to Section 5 as reauthorized in 2006 is thus entirely consistent with the *Boerne* cases, which, like *Katzenbach*, *see* 383 U.S. at 324-327, recognize Congress's broad discretion in enforcing core constitutional rights. And, as the Court's cases further make clear, such discretion is reinforced where, as here, Congress acts to reauthorize a statute on the basis of its predictive judgments formed through experience with the statute's operation over many years.

Three times in the wake of *Boerne*, this Court has addressed legislation protecting classes or constitutional rights that trigger heightened judicial scrutiny, and each time it has upheld the law in question. *See*

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prohibits conduct which is not itself unconstitutional"), and (2) the limitations on Congress's Fourteenth, not Fifteenth, Amendment enforcement power, outside the context of race and voting, *see Garrett*, 531 U.S. at 373 (elucidating the ADA's shortcomings through a comparison to the VRA). As discussed in the next subsection, there are sound reasons for granting greater deference to Congress when it legislates under the Fifteenth Amendment as well as the Fourteenth.

Lopez, 525 U.S. at 283 (upholding 1982 reauthorization of Section 5); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-729 (2003) (holding that Family Medical Leave Act is valid remedial legislation designed to combat gender discrimination in employment); *Tennessee* v. *Lane*, 541 U.S. 509, 529-533 (2004) (Title II of the ADA is a "reasonable prophylactic measure" as applied to courthouse access, denials of which warrant "searching" judicial review). By contrast, the Court has struck down, for failure to satisfy the congruence-and-proportionality test, statutes targeting classifications that receive only rational-basis review. *See Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83-84 (2000) (age classifications); *Garrett*, 531 U.S. at 366-367 (disability classifications under Title I of the ADA). As Appellant concedes (Br. 35), these cases demonstrate that when the right or class at issue receives heightened scrutiny, Congress is due more deference when it assesses the need for and propriety of enforcement legislation. *See* J.S. App. 45. As *Boerne* teaches, "[t]he appropriateness of remedial measures must be considered in light of the evil presented." 521 U.S. at 530.

Here, Congress acted at the zenith of its enforcement authority in reauthorizing Section 5, because that provision addresses *both* the quintessential suspect classification (race) *and* the quintessential civil right (the franchise). First, Section 5 targets racial discrimination by state actors, conduct that goes to the core of both the Fourteenth and Fifteenth Amendments and receives the strictest judicial scrutiny.[9] Second, Sec-

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[9] *See Johnson* v. *California*, 543 U.S. 499, 509 (2005); *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S.

tion 5 protects the right to vote, a fundamental right "preservative" of all others, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886), such that "any alleged infringement of [it] must be carefully and meticulously scrutinized," *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). *See also Bartlett* v. *Strickland*, No. 07-689, 2009 WL 578634, at *6 (U.S. Mar. 9, 2009) (stressing that the right to vote is "one of the most fundamental rights of our citizens"). Congress's factual judgments in favor of reauthorizing Section 5 are thus entitled to the greatest measure of respect. Congress's authority is fortified by the fact that Section 5 targets conduct that not only requires heightened scrutiny in two respects, but is also prohibited by two separate constitutional amendments—so strong is the constitutional imperative to eradicate voting-related racial discrimination. *See, e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 624-628 (1982) (applying the Fourteenth Amendment to protect against race discrimination in voting).

Moreover, precisely because Section 5 addresses both racial discrimination and the right to vote, it does not raise any of the separation-of-powers concerns that this Court cited when it invalidated congressional legislation in *Boerne* and three subsequent decisions. In each of those cases, the Court concluded that the chal-

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252, 266 (1977); *cf. Lane*, 541 U.S. at 561 (Scalia, J., dissenting) ("Giving § 5 [of the Fourteenth Amendment] more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment[.]"); *Mitchell*, 400 U.S. at 129 (opinion of Black, J.) ("Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of [the Civil War Amendments].").

lenged legislation was designed not to enforce Fourteenth Amendment rights that this Court had recognized, but to *expand* the substance of those rights in the teeth of contrary decisions by this Court. *See Boerne*, 521 U.S. at 532 (holding that Fourteenth Amendment remedial legislation must be "responsive to, or designed to prevent, unconstitutional behavior"); *see also id.* at 519-529, 536; *Garrett*, 531 U.S. at 365; *Kimel*, 528 U.S. at 81; *Florida Prepaid*, 527 U.S. at 647-648.

The concern expressed in these decisions is most likely to arise when Congress has legislated to enforce rights secured against the States only by the Fourteenth Amendment. The Fourteenth Amendment encompasses a nearly limitless variety of constitutional challenges to state action; it not only contains primary prohibitions on discrimination, but also "functions as the vehicle through which various [other] rights ... apply to the states." J.S. App. 48; *see, e.g., Boerne*, 521 U.S. at 532 (finding constitutionally troublesome the "[s]weeping coverage" of RFRA, which was applicable to actions "of almost every description ... regardless of subject matter"). Section 5 of the VRA does not raise that concern because it focuses exclusively on the *precise evil* addressed by the much more narrowly focused Fifteenth Amendment: race discrimination in voting.

In particular, unlike the provision held invalid in *Boerne*, Section 5 reflects a quintessentially legislative judgment about the type of remedy necessary to protect an *undisputed* constitutional right against an *undisputed* constitutional evil. After holding 21 separate hearings and compiling a legislative record of over 15,000 pages, Congress concluded that reauthorization of Section 5 was necessary to protect the "fragile" gains that minority voters have made in the covered jurisdic-

tions, *Rome*, 446 U.S. at 182 (internal quotation marks omitted). That judgment warrants "substantial deference" because Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997) (internal quotation marks omitted). And that judgment is due even further deference than most congressional determinations because Congress was not legislating on a blank slate, but reauthorizing a statute already in effect based on its experience with the VRA's operation over many years. Congress's judgment that Section 5 remains necessary is thus precisely like the judgment upheld in *Rome* and unlike that at issue in any *Boerne* case.[10]

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[10] Amici Dr. Abigail Thernstrom *et al.* argue that Section 5 is subject to strict scrutiny because, as amended by Congress, it allegedly mandates race-based districting. That contention is not properly before the Court because it was neither pursued nor passed upon below, *see, e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998), and because Appellant does not present it even on appeal, *see, e.g.*, *Robertson* v. *Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992). Moreover, because that argument concerns only Section 5's application to re-districting, which this case does not involve, addressing it would require the Court to render an advisory opinion, *see Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), as the Thernstrom amici effectively concede (Br. 36-37). If any allegedly impermissible race-based districting occurs, a claim under *Shaw* v. *Reno*, 509 U.S. 630 (1993), would allow for federal court review.

B. Congress's 2006 Reauthorization Of Section 5 Was A Constitutionally Valid Means Of Seeking To Eradicate Racial Discrimination In Voting

Under either the standard that this Court applied to Section 5 in *Katzenbach* and *Rome* or the analysis articulated in *Boerne*, the 2006 record provided more than a sufficient basis on which Congress could determine that Section 5's prophylactic rules remain necessary in Texas and the other covered jurisdictions.[11]

1. The record before Congress provided ample basis for Congress to conclude that Section 5 is still needed to combat and deter voting-related discrimination in covered jurisdictions

As the 2007 sunset date approached on the prior reauthorization of Section 5, Congress undertook a searching examination of whether that provision should be allowed to expire. Congress held more than 20 hearings, heard testimony from dozens of witnesses, and compiled a lengthy record. Based on its extensive review, Congress concluded that allowing Section 5 to lapse would endanger the voting rights of minorities in covered jurisdictions. This Court's analysis in *Rome* and *Lopez*, on which Congress relied, confirms that Congress's conclusion was constitutionally sound.

In *Rome*, this Court rejected a claim, much like Appellant's here, that Section 5 had "outlived [its] usefulness" because "Negro voter registration had im-

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[11] The brief of the Louis Intervenors addresses several aspects of the 2006 congressional record in greater detail, and we respectfully refer the Court to the discussion in that brief.

proved dramatically since 1965." 446 U.S. at 180. Acknowledging that substantial gains had been made, the Court nonetheless sustained Section 5 on the basis of three categories of evidence showing a continuing danger of voting-related discrimination in covered jurisdictions: (1) racial disparities in registration, (2) disproportionately low minority electoral representation, and (3) DOJ Section 5 objections. *See id.* at 180-182. During the hearings culminating in the 2006 reauthorization, Congress received substantial evidence in each of these categories, as well as a host of others. Notwithstanding the progress that had been made, there was evidence of substantial ongoing problems in each category—demonstrating the continuing need for Section 5.

First, as in 1975, Congress in 2006 found significant racial disparities in registration rates in a number of the covered and partially covered jurisdictions. J.S. App. 59-62. Gaps between Hispanics and non-Hispanic whites were particularly large in several covered States (J.S. App. 60-61; H.R. Rep. No. 109-478, at 29 (2006)), including, as Appellant acknowledges, a 16-point gap in registration rates between Hispanics and non-Hispanic whites in Texas. *See* Br. 50; J.S. App. 62. Congress also received evidence indicating that "in most of the covered Southern states, ... black turnout continues to lag turnout of non-Hispanic whites." *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 131 (2006) (supplemental testimony of Prof. Nathaniel Persily); *see also* J.S. App. 61.

Likewise, in 2006, as in 1975, Congress found that "gains by minority candidates remain[ed] uneven, both geographically and by level of office." J.S. App. 63. For example, no African-American had ever been elected to statewide office in Mississippi, Louisiana, or South

Carolina, despite the significant African-American populations in those States. H.R. Rep. No. 109-478, at 33. And in many fully covered jurisdictions, minority representation, even for lower offices, lagged well behind proportional levels. J.S. App. 63; H.R. Rep. No. 109-478, at 33. Appellant responds (Br. 51) that the lack of success by minorities in statewide elections should be ignored because "minorities are elected to local office." But *Rome* explained that it is constitutionally relevant whether the offices held by minorities are "relatively minor" or "statewide." 446 U.S. at 180. *Rome* also held that minority representation in the state legislatures that falls "far short of being representative" is evidence of continuing discrimination. *Id.* at 181.

In the 2006 reauthorization, Congress also followed this Court's guidance in *Rome* by examining "the number and nature of objections interposed by the Attorney General." 446 U.S. at 181. This examination revealed: that DOJ interposed more objections between 1982 and 2004 (626) than between 1965 and 1982 (490), including objections to at least one statewide change in every fully covered State and in most partially covered States (J.S. App. 66, 69-71); that between 1980 and 2000, 421 objections were lodged on the basis of DOJ's determination that the proposed voting change was motivated by a state actor's discriminatory purpose (J.S. App. 77); and that DOJ has objected to more proposed changes from Texas than from any other State (H.R. Rep. No. 109-478, at 73).[12] These objections pre-

[12] The Southeastern Legal Foundation asserts baldly (Br. 28 n.15) that the acts of discrimination identified by Congress "were clearly based on findings of disparate impact." *See also* Scharf-Norton Center Amicus Br. 11 (arguing that many objections were

empted a wide variety of attempted discriminatory changes, including discriminatory redistricting plans, switching offices from elected to appointed positions, enacting discriminatory annexations, setting numbered posts, and switching from single-member to at-large voting systems while implementing majority vote requirements. H.R. Rep. No. 109-478, at 36.

Appellant responds (Br. 52-53) to the record evidence of the hundreds of attempted acts of intentional official discrimination by emphasizing that the overall objection rate under Section 5 is low. This, too, overlooks *Rome*, where the Court sustained the reauthorization even though by 1978 the DOJ objection rate had fallen to 0.8% percent, a fraction of the objection rate immediately following initial passage of the VRA. J.S. App. 64. *Rome* confirms that what is pertinent is not the objection *rate*, but rather the evidence of continuing discrimination as reflected in the volume and nature of attempted discriminatory acts. The hundreds of attempted acts of intentional race-based voting discrimination since the 1982 reauthorization—even with Section 5 in place—gave Congress more than adequate grounds to conclude that Section 5 remains needed to protect minority voters. *See Rome*, 446 U.S. at 181.

Congress also properly took into account a wide variety of other types of evidence demonstrating a danger of ongoing vote-related discrimination in covered jurisdictions. J.S. App. 81-108. For example, several hun-

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not in response to genuine acts of discrimination). But it was Congress's prerogative to resolve disputed factual questions arising from the record before it, and Congress credited evidence showing that intentional discrimination is an ongoing and serious problem. *See* H.R. Rep. No. 109-478, at 36.

dred proposed voting changes were withdrawn, not acted upon, or superseded following requests by DOJ for more information (MIRs). J.S. App. 82. And the proposed voting changes that were withdrawn following MIRs came "primarily" from jurisdictions in southern States with a substantial concentration of African-American voters. H.R. Rep. No. 109-478, at 41. Congress reasonably concluded that these withdrawals were "often illustrative of a jurisdiction's motives." *Id.* at 40. Congress further found that the credible threat of misconduct has led the Attorney General to assign 300 to 600 election observers to covered jurisdictions annually since 1982. J.S. App. 103. Likewise, Congress found that racially polarized voting remains a significant phenomenon in covered jurisdictions. J.S. App. 106-107.[13]

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[13] By itself, of course, racially polarized voting does not constitute state action. However, this Court has recognized that racially polarized voting is what makes possible the discriminatory use of various kinds of voting changes that, although neutral on their face, can be and have been used to "nullify" the ability of minority voters "to elect the candidate of their choice." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 569 (1969); *see also Rome*, 446 U.S. at 183 (proposed "electoral changes ... when combined with the presence of racial bloc voting and *Rome*'s majority white population and at-large electoral system, would dilute Negro voting strength"). Furthermore, the presence of racially polarized voting may provide circumstantial evidence that voting changes bearing more heavily upon minority voters were selected by elected officials in response to racially discriminatory sentiment or pressures in the electorate. *See Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) (racial bloc voting "allows those elected to ignore black interests without fear of political consequences"). Conversely, in the absence of racially polarized voting, adoption of such changes presents far less of a concern because the factual predicate for either a racially discriminatory purpose or a retrogressive effect will likely

In addition, the record before Congress included, for the period since 1982, evidence of "at least 105 successful Section 5 enforcement actions" (J.S. App. 89) and at least 653 successful Section 2 suits in the nine fully covered States. J.S. App. 95.[14] Congress took particular note of one of those Section 2 violations—namely, the one adjudicated by this Court in *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006). In that decision, which Congress considered as it contemplated reauthorization of Section 5, the Court found that a Texas redistricting plan "b[ore] the mark of intentional discrimination that could give rise to an equal protection violation." *Id.* at 440.

Finally, Congress heard and credited expert testimony and other evidence that Section 5 has *deterred* discrimination in covered jurisdictions. *See* H.R. Rep. No. 109-478, at 36 (Section 5 is responsible for many "discriminatory voting changes ... hav[ing] never materialized"); *see also* J.S. App. 108-112. Since, as Congress found, it is Section 5 that has prevented covered jurisdictions from engaging in racial discrimination, Congress also reasonably concluded that the "progress"

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not be present. Thus, not only were Congress's racially polarized voting findings justified, but Congress would have been remiss had it merely assumed that racially polarized voting still exists or had it simply disregarded the issue.

[14] 206 of these Section 2 enforcement suits were filed against Texas jurisdictions, the largest number for any covered State. *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 206-207 (2006) (appendix to statements of Bill Lann Lee & Joe Rogers, "Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005," a report by the National Commission on the VRA).

brought about by Section 5 would be "jeopardized" were the provision allowed to lapse. H.R. Rep. No. 109-478, at 57; *see Rome*, 446 U.S. at 177 (holding that a legitimate basis for reauthorization is to "preserve the ... achievements" of the VRA).[15]

Taken together, the many categories of record evidence amply supported Congress's judgment that racial discrimination in voting remains a problem in the covered jurisdictions, including, without doubt, in Texas.

2. Appellant's challenges to Congress's legislative discretion are without merit

Appellant argues that the extensive record before Congress was inadequate to support reauthorization because it does not show the specific kind of discrimination needed to justify Section 5. According to Appellant (Br. 40, 61), preclearance is constitutionally per-

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[15] Contrary to Appellant's suggestion (Br. 1), the election of President Obama in no way undermines the record of official race-based discrimination in voting before Congress in 2006. Though undeniably a signal of racial progress, the 2008 election has not changed the fact that "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *See Bartlett* v. *Strickland*, No. 07-689, 2009 WL 578634, at *16 (U.S. Mar. 9, 2009) (Kennedy, J., plurality op.). Moreover, the 2008 election, in which the President won only a single fully covered State, only illustrates the sizeable gap between covered jurisdictions and the rest of the country in terms of the degree of racial differences in voting patterns between white and minority voters. *See* Persily Amicus Br. 3 ("[I]n 2008 race played a greater role in vote choice in the covered than in the noncovered jurisdictions."); *id.* at 18 ("[E]ven when one controls for past vote for the Democratic presidential nominee, the effect of race on vote choice remains, as does the greater influence of race in the covered jurisdictions.").

missible only as a remedy against the concerted effort by covered jurisdictions to "game the system to the disadvantage of minorities by acting preemptively to impose new barriers to voting once old barriers are judicially deemed unenforceable" or as a response to an "acute emergency." There is no merit to this argument. This Court upheld Section 5's constitutionality in both *Rome* and *Lopez* without requiring evidence of ongoing gamesmanship—let alone an "acute emergency"—in covered jurisdictions.

As *Rome* makes clear, a decision to reauthorize Section 5 is justified by evidence that voting discrimination persists in covered jurisdictions and is difficult to uproot solely through conventional, reactive litigation. *See* 446 U.S. at 181-182. No showing of "gamesmanship" is necessary. Thus, in *Lopez*, the Court upheld Section 5 even though it was there applied to prohibit a separately covered county from implementing a voting change that state law *required* it to make, and even though the State whose law was at issue—California—is not itself a covered jurisdiction. In upholding Section 5's constitutionality in that context, the Court never suggested that any showing of "gamesmanship" was even relevant to the inquiry. *See* 525 U.S. at 282-285.

Similarly, *Katzenbach* never suggested that gamesmanship was a condition-precedent of Section 5's constitutionality. Rather, as the Court explained, gamesmanship was one component of a much larger problem—the inadequacy of case-by-case litigation as a remedy for deeply rooted discrimination that impairs minority voting rights. *See* 383 U.S. at 313-315, 328; *see also* J.S. App. 128. The Court explained that case-by-case litigation was inadequate not only because of gamesmanship, but also because "[v]oting suits are un-

usually onerous to prepare," litigation is "exceedingly slow," the "burden is too heavy," and "the wrong to our citizens is too serious." 383 U.S. at 314, 315; *see also Boerne*, 521 U.S. at 526 (stressing that Section 5 was necessary because of "the slow, costly character of case-by-case litigation"). In reauthorizing Section 5, Congress concluded that case-by-case litigation remains inadequate by itself to enforce minority voting rights, H.R. Rep. No. 109-478, at 57, and that, given the evidence of continued discrimination in covered jurisdictions, Section 5 remains necessary. Those findings are entitled to considerable deference.[16]

Likewise, no "acute emergency" (Br. 61) is required before Congress may reauthorize Section 5 because such prophylactic remedies are by definition designed to prevent any emergency from recurring in the first place. Here, too, this Court's precedents foreclose any contrary conclusion. For example, although the Court noted in *Rome* that "Negro voter registration had *improved dramatically* since 1965," 446 U.S. at 180 (emphasis added), it upheld the reauthorization of Section 5 because Congress reasonably concluded that reauthorization "was necessary to *preserve* the 'limited and fragile' achievements of the Act." *Id.* at 182 (emphasis added). And in *Lopez*, 525 U.S. at 282-285, this Court

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[16] In any event, the House Committee Report concluded regarding the 1982 to 2006 period that "voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982." H.R. Rep. No. 109-478, at 36. For example, as recently as 2004, a municipality in Texas "while losing or settling a series of lawsuits, repeatedly sought to block students attending an historically black university from voting." J.S. App. 131. This evidence is more fully addressed in the brief for the Louis Intervenors.

upheld Section 5 in 1999 without remotely suggesting that Congress needed to demonstrate an ongoing "emergency" when it reauthorized Section 5 several years after *Rome* was decided. There is no basis for concluding otherwise on this record, now that Congress has determined once more that this preventive measure needs to be retained.

Appellant argues that in the absence of gamesmanship or an emergency, affirmative Section 2 litigation is an adequate means of addressing voting discrimination. Br. 40-41. But Congress specifically considered whether post-hoc litigation alone would provide sufficient protection to minority voters in covered jurisdictions and found that approach "inadequate." H.R. Rep. No. 109-478, at 57. This finding is unsurprising because Section 2 litigation in the covered jurisdictions, unaccompanied by the filtering function of Section 5, has several shortcomings.

First, without preclearance, discriminatory voting practices would go into immediate effect, putting the burden of "time and inertia" on minority voters, *Katzenbach*, 383 U.S. at 328, rather than on jurisdictions with an established historical record of racial discrimination in voting. As in prior reenactments, Congress decided to protect minority citizens from even a temporary impairment of this most fundamental of civil rights during the sometimes prolonged period needed to bring and ultimately prevail in Section 2 litigation.

Second, Congress noted that a repeal of Section 5 would "reverse the burden of proof" in voting cases, forcing the victims of discrimination to demonstrate that they have been harmed. H.R. Rep. No. 109-478, at 66. And Congress heard further testimony that Section 2 cases are particularly resource-intensive to litigate

and difficult to win. *See, e.g., Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 80 (2006) ("The Federal Judicial Center studies the complexity of different types of cases, and has reported that voting cases rank near the top of all civil cases in complexity. In [the] recent Charleston County case, the County spent over $2,000,000 defending the [Section 2] case, and [the plaintiff's lawyers] had to put in over 2000 hours ... in addition to many more hours that the Justice Department put in.") (supplemental testimony of Armand Derfner) (citation omitted). Section 5 complements Section 2 by prescreening voting changes, and it thereby often spares minority groups the substantial costs of pursuing after-the-fact litigation.

Finally, the adequacy of Section 2 cannot be properly evaluated without accounting for the additional discriminatory voting changes that would have been implemented in the *absence* of Section 5's deterrent effect. *See supra* pp. 38-39. If the preclearance remedy were eliminated, more discriminatory voting measures would take effect, and more Section 2 lawsuits would need to be filed. Exclusive reliance on such post-hoc litigation would thus not only impose burdens on voters seeking to stop discriminatory acts, but also, in Congress's considered judgment, require them to bear that burden more often.

3. Section 5 remains appropriately tailored to the harms of voting-related racial discrimination

a. Section 5 is geographically tailored

Section 5 targets "those regions of the country where discrimination had been most flagrant." *Boerne*, 521 U.S. at 532-533. Appellant contends (Br. 56-61),

however, that Section 5 is not geographically tailored enough because Congress used a coverage formula last amended in 1975 as the basis for triggering Section 5 coverage under the VRARA. That argument is without merit. Congress enacted Section 5 to prevent certain jurisdictions with the longest and worst histories of discrimination from resuming discriminatory practices. The coverage formula, in turn, identifies the jurisdictions with such histories. In the VRARA, Congress thus quite properly relied on the same coverage formula, but it also relied on recent evidence confirming that official voting-related discrimination continues in those jurisdictions. And Congress properly looked to the bailout and bail-in provisions to ensure that coverage evolves with the track record of each covered (or potentially covered) jurisdiction.

Congress's careful survey in 2006 of the recent history of voting discrimination in covered jurisdictions yielded a wealth of recent record evidence indicating a substantial basis for ongoing concern in those jurisdictions where opposition to minority voting has historically been most persistent. To be sure, conditions in covered jurisdictions are no longer as bad as they were in 1965, as Appellant argues (Br. 42-43). But Congress was entitled to conclude that Section 5 remains necessary for an additional temporary period in the covered jurisdictions in light of (1) the egregious conditions in 1965, (2) the record of ongoing discrimination in the covered jurisdictions from 1982 to 2006, and (3) the fact that, in many cases, those jurisdictions have made pro-

gress since 1965 precisely *because* Section 5 was on the books.[17]

Appellant downplays the evidence of continuing discrimination in covered jurisdictions by suggesting that there are analogous abuses in non-covered States. Br. 50-51. But misconduct in the covered jurisdictions is no less pernicious simply because discrimination may sometimes occur in non-covered jurisdictions too. The Court has never before required an explanation of Congress's choice *not* to cover certain jurisdictions as a prerequisite to sustaining the Act's constitutionality. Indeed, *Katzenbach* specifically held that it "is irrelevant that the coverage formula excludes certain localities ... for which there is evidence of voting discrimination." 383 U.S. at 330-331. If Congress may enact na-

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[17] Contrary to Appellant's argument (Br. 61), Congress appropriately tailored Section 5 to the constitutional harm at issue by scheduling it to sunset in 25 years. *See Boerne*, 521 U.S. at 533 (noting that "termination dates" can help tailor legislation). In *Lopez*, this Court affirmed the constitutionality of the 1982 reauthorization without suggesting that the 25-year extension in that provision was in any way problematic. And indeed, the decision over the appropriate length of the time to extend a statute is a "quintessentially legislative judgment." J.S. App. 117. As this Court has observed in another context with regard to statutory extensions, the judiciary is "not at liberty to second-guess congressional determinations and policy judgments of this order." *Eldred* v. *Ashcroft*, 537 U.S. 186, 208 (2003). In any event, Congress had good reasons to choose a 25-year period for this extension. Congress specifically considered a shorter extension but ultimately concluded that an extension covering two census cycles would be more appropriate because it provides an incentive for covered jurisdictions to establish the ten-year track record needed for bailout and provides a future Congress with a sufficient record for evaluating the need for any further reauthorization. J.S. App. 116-117, 143.

tional legislation in response to evidence of unconstitutional conduct in only certain jurisdictions, *see, e.g.*, *Hibbs*, 538 U.S. at 729-735, surely Congress may confine the scope of remedial legislation to those jurisdictions, such as Texas, where both history and recent experience confirm that such legislation is most needed.

Moreover, if the data underlying the coverage formula were "obsolete," as Appellant contends (Br. 60), then differences between covered and non-covered jurisdictions should have evaporated. Yet, as the district court correctly found, "[t]he legislative record reveals significant differences between covered and non-covered jurisdictions." J.S. App. 138. A study before Congress indicated that Section 2 challenges are brought at a higher rate relative to population in covered jurisdictions, and that those suits are more often successful than suits brought in non-covered States. *Id.* This disparity is all the more remarkable given that Section 5 itself has deterred or blocked additional discriminatory voting changes in covered jurisdictions, thereby masking the true degree of difference between covered and non-covered jurisdictions.

b. Section 5 is tailored to minimize its federalism costs

Finally, Section 5 is tailored to the evidence of discrimination assembled in the 2006 record because the preclearance remedy has several features designed to minimize its federalism costs—features that further distinguish Section 5 from the statutes invalidated in the *Boerne* cases.

First, the 2006 record overwhelmingly concerns voting procedures enacted and enforced by state actors. Section 5, therefore, does not raise any concern,

such as those noted by the Court in the *Boerne* cases, that Congress might have relied on evidence of misconduct by society generally, as opposed to unconstitutional conduct by public authorities. *See, e.g.*, *Garrett*, 531 U.S. at 369 (the vast majority of evidence before Congress related to societal discrimination, as opposed to discrimination by state actors); *Kimel*, 528 U.S. at 90 (Congress's findings of substantial age discrimination in the private sector were "beside the point" where Congress "made no such findings with respect to the States"); *Florida Prepaid*, 527 U.S. at 640 (finding that in contrast to voting rights cases, "Congress came up with little evidence of infringing conduct on the part of the States").

Second, Section 5 contains no provision authorizing private citizens to recover money damages from state or local treasuries. It has been suggested that, when Congress authorizes private suits against States for money damages under the Fourteenth and Fifteenth Amendments, the need for Congress to avoid the redefinition of constitutional rights "has special force," and that "[t]hese basic concerns underlie cases such as *Garrett* and *Kimel*." *Hibbs*, 538 U.S. at 744 (Kennedy, J., dissenting); *see also Alden* v. *Maine*, 527 U.S. 706, 750-751 (1999); *Kimel*, 528 U.S. at 67; *Florida Prepaid*, 527 U.S. at 646; *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring). In contrast with the provisions at issue in *Garrett*, *Kimel*, and *Hibbs*, Section 5 imposes no monetary liability, and for voting changes that have a nondiscriminatory effect and intent, typically causes no more than a short, temporary delay in the covered jurisdiction's implementation of the change.

Third, the record before Congress made clear that the burden of complying with Section 5 is generally not onerous. While there may be a few preclearance sub-

missions that require more significant resources, *see* Br. of Hon. Bob Riley 17-22, an election official from North Carolina testified that most Section 5 submissions "are routine matters that take only a few minutes to prepare," *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and View From the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 313 (2006) (statement of Donald Wright), and that "preclearance requirements ... do not occupy an exorbitant amount of time, energy or resources," *id.* at 13.

The record in this case bears out that observation. Complying with Section 5 has imposed almost no burden on Appellant. Section 5's preclearance requirement has cost Appellant an average of only $223 per year, amounting to less than one-tenth of one percent of its average annual expenditures. J.A. 268-270, 272, 274-275. Nor has compliance imposed any administrative burden on Appellant or its board members. J.A. 51, 57-58 (testimony of former general counsel, who prepared all but one of Appellant's Section 5 submissions: "I don't think I ever had one of the board members take a look at [a] submission."); J.A. 35-37, 41 (testimony of former Board President that he "flipp[ed] through" a draft submission, but noted no comments, and that in his estimation the Board spends only 1/1000th of its time on Section 5 compliance). Section 5 compliance also has never prevented Appellant from implementing a voting change on time. J.A. 22-23, 39-40, 59.

The complete absence of state or local governmental opposition to the reauthorization of Section 5 also speaks volumes. In the reauthorization proceedings before Congress, no witness for any governmental entity testified against reauthorization. To the contrary,

a coalition of organizations representing the interests of thousands of elected state and local officials advocated for renewal of the VRA's enforcement provisions. 152 Cong. Rec. H5143, H5146 (daily ed. July 13, 2006). Congressional delegations representing the covered jurisdictions also voted overwhelmingly for Section 5's reauthorization. *Id.* at H5207.

Likewise, in this litigation, neither Texas, nor any other covered State, nor any of the hundreds of covered local jurisdictions, has filed an amicus brief supporting Appellant's contentions.[18] Indeed, Appellant's home county, Travis County, intervened in this case as a defendant, stressing that the "administrative costs associated with Section 5 compliance ... are outweighed by the valuable benefits to the County and its voters that come with the continued existence and application of Section 5."[19] That practical judgment, shared by so many other covered jurisdictions as well as Congress and DOJ, underscores both the value of and the continued need for this vital civil rights provision.

CONCLUSION

The judgment of the district court should be affirmed.

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[18] The Governor of Georgia filed a brief in support of Appellant on behalf of himself, and not his State. The Governor of Alabama filed a brief in support of no party, and on behalf of himself.

[19] Travis County Intervention Mot., Dkt. No. 23, at 3 (Nov. 6, 2006).

Respectfully submitted.

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APPELLEE'S BRIEF

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In The

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., Attorney General
of the United States of America, *et al.*,

Appellees.

**On Appeal From The United States
District Court For The District Of Columbia**

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QUESTIONS PRESENTED

1. Whether Section 4(a) of the Voting Rights Act authorizes a limited-purpose local governmental district, without authority to register voters, to seek judicial termination of the district's obligations under Section 5 of the Act.

2. Whether Section 5 of the Voting Rights Act is "appropriate legislation" under the Fourteenth or Fifteenth Amendment's congressional enforcement provisions.

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STATEMENT OF THE CASE

This case concerns Sections 4 and 5 of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("2006 VRA Reauthorization"), §§ 4 & 5, Pub. L. No. 109-246. The reauthorization became effective on July 27, 2006.

Travis County focuses on the local impact of the 2006 VRA Reauthorization and provides a narrower statement of the case and its context than the briefs of other appellees.[1] The district court rejected the claim that Section 5 of the Act imposes undue burdens on the local government challenger. J.S. App. 150-53. The County addresses why the district court is correct, and the challenger wrong, about the continuing salience and viability of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

A. The MUD's creation, demographics, and preclearance activity

The Voting Rights Act first became law in 1965. Section 5 of the Act required "covered jurisdictions" to obtain administrative or judicial preclearance of

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[1] Travis County adopts the arguments on both Section 4(a) bail-out and Section 5 constitutionality in the Brief for Intervenor-Appellees Texas State Conference of NAACP Branches, *et al.* and the Brief for Intervenor-Appellees Rodney and Nicole Lewis, *et al.*

electoral changes in advance of implementation. *Clark v. Roemer*, 500 U.S. 646, 652 (1991). Texas, however, was not subject to Section 5 requirements until 1975, when Congress amended the Act and Texas became a "covered jurisdiction," required to obtain Section 5 preclearance for all changes affecting voting which were enacted or administered after November 1, 1972. J.A. 393; *see* 40 Fed. Reg. 43,746 (Sept. 23, 1975).

A decade later, a private developer petitioned the state environmental agency for creation of a municipal utility district,[2] to be known as the Northwest Austin Municipal Utility District Number One ("MUD" or "District"), embracing just over 700 acres of undeveloped land at the northwest edge of Travis County. J.A. 394, 402. Its boundaries would coincide with a residential subdivision known as Canyon Creek. J.A. 403.

The state agency approved creation of the MUD in 1986, then re-approved its creation in 1988. J.A.

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[2] A "municipal utility district" is a special-purpose local government created under Texas general law, specifically Chapters 49 and 54 of the Texas Water Code, or by special legislation. D. Brooks, *County and Special District Law*, 36A TEX. PRAC. § 46.6, at 123 (2nd ed. 2002). The MUD in this case is created under general law, not by special legislation. J.A. 393. The name of the state environmental agency has changed several times since the mid-1980s. It is currently known as the Texas Commission on Environmental Quality.

394, 396.[3] At the time, only one person lived inside the District boundaries, and, in the ensuing local confirmation election, cast the election's only vote in favor of the District's creation. J.A. 396. The MUD, therefore, officially came into existence in mid-1988.

The population of the District has grown from an estimated twelve people in 1990 to about 3,500 in 2000. J.A. 403-04. It constitutes only a small part, less than one half of one percent, of Travis County's population. Texas State Conf. of NAACP Branches Summary Judg. Mot., Dkt. No. 100, Exh. 3 (Robinson Report). The MUD is substantially less racially diverse than the County as a whole. The combined African-American and Latino population of the district is 7%, compared to 37.2% for the County. *Id.* The District's annual median family income of $103,200 is nearly double that of the County as a whole. *Id.*

The MUD is wholly inside the boundaries of both Travis County and the City of Austin. J.A. 393-94. But, it is not subject to the control or authority of either of them. J.S. App. 18. It is governed by a 5-member board that is elected at-large (though not by numbered place) to 4-year terms in non-partisan contests. J.A. 404-06. It has no employees, and its current governmental functions are limited to providing payment of existing bonds and contracts and

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[3] The re-approval appears to have been necessitated by the bankruptcy of the private developer, which precipitated the resignation of the District's interim directors. J.A. 395.

maintenance of the community park and walking trails within the District. J.S. App. 402; MUD Summary Judg. Mot., Dkt. No. 99, Exh. 18 (Ferguson Depo. at 25 & 31).[4]

Since its inception, the MUD has made eight submissions for administrative preclearance under Section 5, stretching over an 18-year span from 1986 to 2004. J.S. App. 408-10; 414. Its last submission was in early 2004. J.A. 412. None drew an objection from the Attorney General. J.A. 390; J.S. App. 413. The annualized cost to the MUD for these submissions was $223. J.S. App. 415.

B. Travis County's role in elections

Among the many local governments based in Travis County, the County itself is the central force in the conduct of elections. Through two of its elected officials – the County Tax-Assessor Collector and the County Clerk – the County is the only entity charged with the responsibility for registering voters in the County and is the principal administrator of elections. J.A. 93 (voter registration); J.A. 87 (conduct elections).

The County Tax-Assessor Collector is statutorily designated the "voter registrar" for all elections. J.A.

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[4] Municipal utility districts also have authority to sue to enforce private restrictive covenants. TEX. WATER CODE § 54.237. Nothing in the record indicates that the MUD has exercised this authority.

420; *see* TEX. ELEC. CODE § 12.001. The voter registrar may appoint deputy registrars and volunteer deputy registrars. *Id.* §§ 12.006(a), 13.031(a), 13.046(a). She makes registration eligibility determinations, issues voter registration certificates, hears challenges to registration of voters, and prepares the certified list of registered voters in each precinct in the County. *Id.* §§ 13.071, 13.142, 16.091, 18.001.

The County Clerk is the chief election officer for the County. *Id.* § 31.091(1). She is charged with training poll workers – election judges and election clerks – using a state-developed training program,[5] and this training extends to poll workers selected by the MUD and other local governments in the County. *Id.* §§ 31.093(b), 32.114(a). She also is authorized to contract with other local governments to administer their elections. *Id.* § 31.092(a); ch. 271.

Travis County is under contract with 107 jurisdictions to administer their elections. J.A. 87-88, 398. The MUD is one of these jurisdictions. J.A. 398.[6] The

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[5] The Texas Secretary of State sets standards for training election judges. TEX. ELEC. CODE § 32.111(a).

[6] The MUD's arrangement with Travis County does not relieve the MUD of its Section 5 obligations. The joint election contracts are standardized. J.A. 398. They all contain a provision such as the one in the 2006 joint election agreement the MUD entered into with the County, which states: "Each of the Entities shall be individually responsible for obtaining appropriate preclearance, if necessary, from the United States Department of Justice." *See, e.g.*, MUD Summary Judg. Mot., Dkt. No. 99, Exh. 14 (DeBeauvoir Depo. Exh. 5, at 8).

MUD was one of the last local jurisdictions to enter into one of these joint election agreements, and the County administered its first election for the MUD in May 2004. J.A. 398-99.[7] The MUD entered into another joint election agreement with the County for the MUD's May 2006 election. J.A. 399. The MUD obtained preclearance of the 2004 joint election agreement, but apparently not the 2006 agreement. J.A. 410, 400.[8]

C. The MUD's suit, Travis County's intervention, and the District Court's decision

In the summer of 2006, only eight days after the 2006 VRA Reauthorization became law, the MUD filed suit, asserting a statutory right to bail out from Section 5 coverage under the Act and, failing that, seeking a declaration that Section 5 is an unconstitutional exercise of congressional power. Travis County intervened to protect, against MUD usurpation, the County's role as the arm of local government authorized to determine whether to seek bailout under

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[7] While the state environmental agency exercises broad regulatory authority over municipal utility districts, none of that authority extends to the conduct of elections.

[8] The County also separately submitted and obtained preclearance of the 2004 joint election agreement. J.A. 411. The County draws a distinction between an election services agreement and a joint election agreement. An election services agreement is a long-term contract. J.A. 32 (election services agreement). In contrast, there is a separate joint election agreement with every participating jurisdiction for every election. MUD Summary Judg. Mot., Dkt. No. 99, Exh. 14 (DeBeauvoir Depo. at 35-36).

Section 4(a) of the Act, 42 U.S.C. § 1973b(a)(1), and, also, to defend the continued viability of Section 5 of the Act as an essential legal tool for ensuring that "minority voters in the County are afforded full and equal access to the electoral system for every government entity in the area." Travis County Intervention Mot, Dkt. No. 23, at 3.

The district court determined that the District was not statutorily entitled under Section 4(a) to seek bailout from Section 5 requirements and that Section 5 is a constitutional exercise of congressional enforcement powers under both the Fourteenth and Fifteenth Amendments. The court concluded that the MUD's lawsuit constitutes a facial challenge, but, as a precaution, considered two MUD arguments that might be construed as an as-applied challenge. J.S. App. 31-32. The court rejected both these arguments, J.S. App. 144-53, finding it "impossible to conclude that section 5 imposes any meaningful burden on the District," J.S. App. 153.

SUMMARY OF ARGUMENT

The 2006 VRA Reauthorization, extending the life of Section 5 and its preclearance requirements, is "appropriate legislation" within Congress's enforcement powers under the Fourteenth and Fifteenth Amendments. The District which has launched the broad constitutional challenge does not register voters locally. It never has, and, under current state

law, it never will. The District's experience with the election process itself is uncommonly modest and narrow. In the two decades of its existence, it has conducted only one actual contested election, seven years ago in an election drawing less than a thousand votes, and, therefore, is institutionally inexperienced with the benefits that Section 5 coverage brings. It also has had little practical occasion to have to come to grips as a government with the often subtle or hidden threats to the integrity of election systems and operations that make Section 5's continued existence so important. The burdens it experiences from Section 5's continued existence are accurately described as "trivial" by the district court.

Travis County, which actually registers voters and conducts elections for itself and more than a hundred other local jurisdictions, is in a position to have a quite different perspective on the comparative burdens and benefits of Section 5 and its preclearance requirement. That experience leaves the County comfortable in concluding that Section 5 is far from being an anachronism.

Furthermore, the contrast between the MUD's limited electoral role and the County's close involvement in the machinery of elections, including the registration of voters and the maintenance and dissemination of the voter registration lists to local precincts, also highlights the wisdom in the 1982 congressional extension of the Section 4(a) bail-out option in covered states to the local jurisdictions responsible for conducting voter registration – but no

further. This legislative choice closely matches local electoral realities and duties.

Section 5 remains salient in Texas. Someday, experience may demonstrate that the balance has shifted and that the need for Section 5 has shrunk to the point that its modest burdens have come to outweigh the benefits it brings. By overwhelming margins, Congress concluded in 2006 that such a time had not yet come. Congress made the right decision.

ARGUMENT

Section 5 of the Voting Rights Act continues to provide benefits in covered jurisdictions, which outweigh the comparatively trivial burdens the statute imposes on local governments such as the MUD and the County.

The MUD seeks to remove what it characterizes as "the burden of federal preclearance." MUD Br. at 2. But, the MUD's role in elections, and the burdens it suffers under Section 5, are minute. Travis County, on the other hand, has a core role in elections, including the MUD's elections, and its perception of the relative benefits and burdens of the preclearance requirements of Section 5 differ markedly from the MUD's. As pointedly observed only recently, racial discrimination in voting is not a thing of bygone days and generations; instead, "[m]uch remains to be done to ensure that citizens of all races have equal

opportunity to share and participate in our democratic processes and traditions." *Bartlett v. Strickland*, ___ U.S. ___, slip op. at 21 (March 9, 2009) (plurality opinion). Section 5 remains essential to this unfinished task.

Travis County has long and intimate experience with the realities – the nitty-gritty – of election administration at the most personal levels. From this experience, Travis County is well acquainted with the vigilance that continues to be required to ensure that, where racial prejudice comes face-to-face with voters, the prejudice is trumped, muted, or suppressed, and the voters left free to give untrammeled expression to their democratic will. Section 5 of the Voting Rights Act is an invaluable tool the County uses – still uses – every election cycle to help tamp down or eliminate the insidious influence of racial discrimination. It is critically important that the County, and the many people it enlists each election to aid it in the complex task of administering elections, know that the burden rests with them, not voters who may experience discrimination and disenfranchisement, to ensure changes are non-discriminatory. Relying on Section 2 alone, and waiting, as the MUD urges, until after the discriminatory action is to wait too long.

Each individual election matters. The MUD touts Section 2 of the Act, 42 U.S.C. § 1973, as a sufficient guardian of the fundamental rights of minority voters, MUD Br. at 27, but this provision only offers the prospect of remedying discriminatory actions that

have already had an impact.[9] Section 5, on the other hand, offers the prospect of actually preventing discriminatory election actions from ever taking effect. Viewed in this, its proper light, Section 5 is more akin to preventive maintenance, and Section 2 to major repairs. It would undoubtedly prove more costly to the County to litigate a Section 2 case to conclusion (and, if found liable, remedy the violation), than to consider and address in advance – in the process of seeking and obtaining preclearance – the potential impact on minority voters of changes contemplated for the electoral system. If ever there were a circumstance where an ounce of prevention is worth a pound of cure, it is in the fundamental democratic event of conducting elections free of racially discriminatory actions.

In contrast to the County's wide experience and duties, the MUD has little knowledge of the realities of conducting elections and taking on the task of ensuring that the full range of the election process is as free of the impositions of racially discriminatory actions and threats as practically possible. The MUD has conducted just six elections on its own in its history, only one of which was contested and had more than a total of twenty votes cast. J.A. 394-98. It has not conducted any of its own elections since the spring of 2002. J.A. 398-400. It has never registered any voters.

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[9] "[P]ractical considerations sometimes require courts to allow elections to proceed despite pending legal challenges." *Riley v. Kennedy*, 128 S.Ct. 1970, 1985 (2008).

So, the MUD's experience with Section 5, the realities of voting, and the interaction of the two is hardly a meaningful counterweight to Travis County's, much less to the evidence Congress accumulated when it was considering the 2006 VRA Reauthorization. Even the MUD's professed concern about how, in 2031, it will "continue to be burdened" by Section 5's requirements, MUD Br. at 58, rings hollow. The MUD has little left to do in the way of governance; its bonds are in the process of being paid off. Five years after its bonded indebtedness is retired, the state environmental agency may dissolve the MUD, and, if by then it has not been annexed by the City of Austin,[10] its assets will escheat to the state. TEX. WATER CODE §§ 49.321, 49.327. It is not at all unreasonable to predict that the MUD's demise as a governmental entity will happen well in advance of the Section 5 extension's expiration.

Municipal utility district powers in general are tightly circumscribed under Texas law. First, the state constitutional grant of authority for the creation of such districts specifies a limit on their powers which the legislature cannot expand. *Deason v. Orange County Water Control & Improvement District No. 1*, 151 Tex. 29, 244 S.W.2d 981, 984 (1952) (addressing scope of the Texas Constitution's Conservation Amendment, Article XVI, § 59). Second, even legislative grants of power to these entities are read

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[10] *See* TEX. LOC. GOV'T CODE § 43.074 (dealing with dissolution of in-city municipal utility districts upon annexation by home rule cities such as the City of Austin).

restrictively. *Tri-City Fresh Water Supply District No. 2 of Harris County v. Mann*, 142 Tex. 280, 142 S.W.2d 945, 948 (1940) (explaining that local water conservation districts only have powers that are clearly granted by the legislature and necessarily implied to effectuate the express powers and describing such districts as "low down in the scale or grade of corporate existence").

The combination of these fundamental state law limitations on the MUD's powers and the sheltered, circumscribed world it has carved for itself in the electoral sphere makes the MUD an unlikely symbol of a "burdened" local government overcome by the behemoth of Section 5. Section 5 has never prevented the MUD from timely implementation of a voting change. J.A. 22-23, 39-40, 59. It has spent virtually none of its resources on Section 5 compliance, J.A. 268-70, 272, 274, and it has virtually no familiarity of its own with the election process. It has never registered voters. Except for this litigation, the MUD's governing board has paid no meaningful attention to the nuts and bolts of Section 5 compliance. "I don't think I ever had one of the board members take a look at [a] submission," testified the attorney who had prepared all except one of the MUD's preclearance submissions. J.A. 51, 57-58. A former board president estimated that the board spent less than one-tenth of one percent of its time on Section 5 compliance and said that he recalled "flipp[ing] through" a draft submission once. J.A. 35-37.

It is for these reasons that the district court reached the well-founded conclusion that "the District's burden is trivial." J.S. App. 152.

In contrast, the County has to take into account a wide array of election-related responsibilities, especially with regard to voter registration activities and the conduct of elections. The County has had to exercise these election-related responsibilities over a time span much longer than the District's existence.

The current Travis County Clerk has served for the last twenty years, roughly two-thirds of the time that Section 5 has been applicable to Texas. MUD Summary Judg. Mot., Dkt. No. 99, Exh. 14 (DeBeauvoir Depo. at 21). She explained that, after these many years, with the County's development of settled administrative routines and familiarization with the rules governing Section 5, the process has become relatively quick and easy. *Id.* at 12.[11]

Thus, the County's experience stands in marked contrast to the MUD's in weighing the burdens and benefits of Section 5. There is a burden imposed by Section 5, but it is modest and has not proven at all

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[11] "I do – I take the liberty of – of having a final review that my staff does, but it is so administrative and so rote by now, it's a fairly quick process. . . . My role is to provide correct information and explanations. Why did we move a particular polling place from a school to a church or vice versa? It could have been something like the – the building refused to house us because of the date of the election. It could be construction. It could be fire, rain. I mean, there could be any number of reasons we provide the explanation."

disruptive to the County's governance and administration of elections. The County has not drawn a Section 5 objection since at least the mid-eighties. *Id.* at 22.

On the other side of the scale, the County – not to mention its voters – receives benefits from the Section 5 preclearance process. The statute's valuable educational and deterrent effects aid the County and its election officials in administering their multifaceted election duties, for the County itself and the more than one hundred jurisdictions whose elections the County administers.

Moreover, the contrast in the experience and involvement of the MUD and the County in election administration highlights the congressional wisdom in its 1982 extension of the bail-out option in covered states to local jurisdictions, such as Travis County, that register voters. *See* J.S. App. 21-22 (district court discussion of 1982 amendments to Voting Rights Act to add Section 14(c)(2) political subdivisions to those eligible to seek Section 5 bail-out under Section 4(a)).

The County conducts the voter registration process for the whole County, it maintains and distributes the voter registration lists, it draws and redraws the precinct lines, and, by contract, it conducts elections for essentially all the other jurisdictions lying inside the County. In short, it is intimately familiar with the full gamut of the election process, putting it in a strong position to make assessments of whether the background factual circumstances exist

to seek bail-out and to make a considered judgment about whether seeking bail-out would be a beneficial step for the County. The MUD, with its limited range of authority and its truncated role in the election process, is hardly in an institutional position to make those kinds of assessments and judgments. It has no systematic way, and lacks the resources, to evaluate how the voter registration process – the historic key to the Section 5 coverage formula – is functioning in its own, small subdivision. This comparison of the institutional roles and capabilities of the County and the Board exemplifies at the local level why the 1982 congressional choice to extend the bail-out option to local jurisdictions which register voters, but no further, matches the reality of the way local government operates in the electoral sphere. There is no practical reason for engaging in the strained statutory interpretation urged by the MUD to extend the bail-out option beyond the bounds set by Congress.

In a leading Section 5 decision, the Court explained: "The abstract right to vote means little unless the right becomes a reality at the polling place on election day." *Perkins v. Matthews*, 400 U.S. 379, 387 (1971). The County's experience is that Section 5's strictures continue to contribute in a positive way to making the right to vote, free of racial discrimination, a reality in the elections it administers. The tasks of encouraging citizens to register to vote and selecting polling locations may seem mundane and inconsequential in comparison to broader theories about the reach of congressional power and

federalism. But, from Travis County's perspective, Congress successfully melded the two concepts – the general and the particular – in the reauthorized Section 5. There remain solid reasons to keep Section 5 on the statute books. Congress was right to renew it. Its continued benefits outweigh the burdens, real or theoretical, ascribed to it.

CONCLUSION

The district court judgment should be affirmed.

Respectfully submitted,

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